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No. _____

In The
Supreme Court of the United States

HOLLY L. STAUNCH,
Petitioner,

v.

CONTINENTAL AIRLINES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 9, 2008

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QUESTIONS PRESENTED FOR REVIEW

1. Where an employer does not maintain an accurate record of employees' hours worked, is an employee required to produce evidence of the specific days and hours that she worked in order to meet the definition of "eligible employee" under the Family Medical Leave Act.

2. Where an employer does not maintain an accurate record of employees' hours worked, does a court misapply the summary judgment standard when the court grants summary judgment in favor of the employer on the basis that the employee had not worked 1250 hours in the twelve months preceding her request for leave, despite the fact that the employee filed a sworn affidavit disputing the employer's calculation of hours and stated that she worked 2,323 hours in the twelve months preceding her request for family medical leave.

3. Where an employer does not maintain an accurate record of employees' hours worked, may an employee provide evidence in the form of testimony from her own memory regarding hours worked in order to rebut the employer's allegation that the employee was not an eligible employee under the Family Medical Leave Act because she failed to work 1250 hours in the twelve months prior to requesting leave.

PARTIES

All parties are listed in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

Holly L. Staunch is an individual with no corporate affiliations.

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 511 F.3d 625 (6th Cir. 2008), 102 Fair Empl.Prac.Cas. (BNA) 820, 90 Empl. Prac. Dec. P 43,071, 155 Lab.Cas. P 35,384, 13 Wage & Hour Cas.2d (BNA) 175, 36 NDLR P 71. The Sixth Circuit affirmed, on alternative grounds, the decision of the United States District Court for the Eastern Division of Ohio, reported at 2007 WL 218729 (N.D.Ohio), 12 Wage & Hour Cas.2d (BNA) 422.

BASIS FOR JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Sixth Circuit's opinion was issued on January 7, 2008. On January 22, 2008, Staunch filed a timely petition for rehearing en banc. The petition for rehearing was denied on April 11, 2008.

District Court Jurisdiction over the federal issues was invoked pursuant to 28 U.S.C. § 1343(4) and over the state issues pursuant to the supplemental jurisdiction provided by 28 U.S.C. § 1367. Sixth Circuit jurisdiction was invoked pursuant to 28 U.S.C. § 1291.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

29 U.S.C. § 2611. Definitions

As used in this subchapter:

***

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed--

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

***

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

***

29 C.F.R. § 825.110 Which employees are "eligible" to take leave under FMLA?

(a) An "eligible employee" is an employee of a covered employer who:

(1) HHas been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (See § 825.105(a) regarding employees who work outside the U.S.)

***

(c) Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (see 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used. In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (e.g., bona fide

executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee is deemed to have met this test. See also § 825.500(f). For this purpose, full-time teachers (see § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave.

***

29 C.F.R. § 825.500 What records must an employer keep to comply with the FMLA?

***

(c) Items required. Covered employers who have eligible employees must maintain records that must disclose the following:

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or

deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA eligible employees (e.g., available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all general and specific written notices given to employees as required under FMLA and these regulations (see § 825.301(b)). Copies may be maintained in employee personnel files.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave,

including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

***

(f) If FMLA-eligible employees are not subject to FLSA's record keeping regulations for purposes of minimum wage or overtime compliance (i.e., not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

(2) with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with paragraph (b) of this section.

***

Principles for Determination of Hours Worked

29 CFR § 785.7 Judicial construction.

The United States Supreme Court originally stated that employees subject to the act must be

paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business." (*Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U. S. 590 (1944)) Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." (*Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Skidmore v. Swift*, 323 U.S. 134 (1944)) The workweek ordinarily includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place". (*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)) The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities. See § 785.34.

29 CFR § 785.8 Effect of custom, contract, or agreement.

The principles are applicable, even though there may be a custom, contract, or agreement not to pay for the time so spent with special statutory exceptions discussed in §§ 785.9 and 785.26.

Federal Rule of Civil Procedure 56. Summary Judgment

***

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

***

(e) Affidavits; Further Testimony.

(1) ***In General.*** A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or

> certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.
>
> ***

As the provisions of 29 U.S.C. § 2611, 29 C.F.R. § 825.110, 29 C.F.R. § 825.500, and Fed. R. Civ. P. 56 are lengthy, they are set out completely in the Appendix. See Appendix D, p. 46a *et seq.*

STATEMENT OF THE CASE

Holly L. Staunch was hired by Continental Airlines to work as a flight attendant in May of 1998. Staunch successfully completed all training, her probationary period, and all required recurrent training. During her employment, Staunch received frequent commendations, and was honored at times for perfect attendance and for having ten (10) "Orchid" or complimentary letters in a twelve month period.

In January of 2002, Staunch found out that she was pregnant. Soon after, she began having complications including placenta previa and extreme nausea. Placenta previa is a misplaced or low lying placenta. She was classified as a high-risk pregnancy.

Staunch was under the continuing care of her physician for serious health conditions related to her pregnancy. She requested intermittent leave from her employment based upon her own serious health condition related to her pregnancy. Her request for

leave form noted that from 1/11/02 until 9/18/02, leave was requested, "when needed due to pregnancy on intermittent days."

Continental specifically approved Staunch's request for intermittent leave from work due to her pregnancy. In correspondence to Staunch dated April 28, 2002, Janie DeVito, In-flight Director for Continental, specifically told Staunch, "Holly, up to this point we have allowed you the opportunity to use you family leave intermittently as you requested." All of Staunch's absences from work between January 11, 2002 and April 28, 2002, were due to her pregnancy.

Staunch returned to work in January of 2003, following the birth of her child. In September of 2003, Staunch was placed on a termination warning for unacceptable attendance. Despite Continental's prior representation that it had granted Staunch's request for intermittent leave, Continental's documents show that it took into account as a negative factor in the decision to place Staunch on a Termination Warning and ultimately to discharge her, her time away from work while she was on approved intermittent leave from work due to her pregnancy. The document placing her on termination warning specifically referenced dates Staunch had been absent from work due to her pregnancy as "instances of unacceptable attendance." The termination warning negatively referenced dates that had been expressly recorded in Continental records as covered by family medical leave. Staunch filed a grievance over being placed on a termination warning. Her grievance was denied, and Continental again referenced her absences during the

period covered by her intermittent medical leave as part of the basis for denying the grievance.

On April 22, 2004, Staunch self-reported the fact that her flight manual was not up to date. She became aware she was missing a revision when she was given an update to place in the manual and the pages did not match up with her manual. Staunch admitted that it was her responsibility to make sure the manual was up to date, but said that she had not been provided the prior update in her "v-file" as was the usual practice.

Staunch was terminated from her employment on April 29, 2004. The notice of termination served on Staunch specifically referenced Staunch's pregnancy related time off from work as having been considered in arriving at the decision to terminate her employment. On May 10, 2004, after Staunch's discharge, DeVito wrote a letter to Staunch explaining the basis for the discharge. The letter expressly stated that Staunch was "held accountable" for four instances of lost time during the period of January 2002 to April 2002.

Continental contends that Staunch was terminated for not having her flight manual up to date in violation of company policy and Federal Air Regulations of the Federal Aviation Administration.

Staunch was the only flight attendant discharged for having a non-compliant flight manual. DeVito testified that other than the non-compliant manual, there were no performance issues other than those that related to reliability that formed the basis for Staunch's discharge. Margo Jedlinski and Nicole

Longshaw were other flight attendants found to have non-compliant flight manuals and received no discipline. Cheryl Miller, Dawn Thibeaux, and Jennifer Orlando were flight attendants found to have non-compliant manuals and were given written warnings. Had Staunch not been placed on termination warning as a result of her pregnancy related absences from work, she would not have been terminated for reporting to management that she had found that her in-flight manual was missing a revision.

On April 25, 2006, Staunch filed her complaint alleging that Continental interfered with her rights under the Family Medical Leave Act and retaliated against her for using Family Medical Leave. Staunch also alleged that Continental violated Ohio law protecting the rights of pregnant employees, and the public policy of the State of Ohio.

An Amended Complaint setting forth the same claims was filed on August 28, 2006. On September 7, 2006, Continental filed an Answer to the Amended Complaint.

On December 18, 2006, the parties each filed motions for summary judgment.

One of the arguments made by Continental was that Staunch was not an eligible employee as defined in the Family Medical Leave Act because she did not work 1250 hours in the twelve months preceding her request for leave.

There was no dispute that Staunch was employed by Continental for more than twelve months. Nor was there any dispute that she was employed at a work site where there were more than fifty employees within a seventy-five (75) mile radius. The parties did dispute whether Staunch worked 1,250 hours in the twelve months preceding her request for leave.

Continental did not keep accurate records of Staunch's actual hours worked. Pay for flight attendants was based upon certain contractual agreements that were based upon predetermined flight hours, and was not based upon the actual time worked.

In support of its motion, Continental submitted an affidavit from a human resources employee, Mary Sturchio, in which Sturchio attempted to compute the number of hours Staunch worked by taking Staunch's schedule and adding time for other activities as provided in the collective bargaining agreement between Continental and Staunch's union. Sturchio's affidavit estimated the number of hours Staunch worked in the twelve months preceding her request for leave to be 1127 hours forty-one minutes. See Appendix E, p. 64a *et seq.*

Staunch's submitted an affidavit specifically contesting the accuracy of Continental's calculation of hours worked. She stated:

> 8. Continental's submission based upon the affidavit of Mary Sturchio does not reflect the actual hours I worked for Continental. For example, the Sturchio submission listed release time as 15 minutes for each duty day

worked. In fact, work was performed after each flight segment and 15 minutes was not sufficient to perform the duties required.

9. Sturchio's submission listed forty five minutes for report time for a remain overnight layover, when in fact, I had to report at least one hour before the start of each day.

10. Sturchio's affidavit does not accurately reflect the time spent in recurrent training and in preparation for recurrent training.

11. Sturchio's affidavit does not include time for required computer work, manual revisions, review of briefing books, meetings with supervisors, time for making required liquor deposits as lead flight attendant, time going through customs or travel time spent on behalf of the employer.

See Appendix F, pp. 71a-72a.

Staunch had personal knowledge of the hours she worked. She filed an affidavit stating she worked more than 1,250 hours in the twelve months prior to her request for FMLA leave. She prepared and submitted to Continental, with her answers to interrogatories and response to Continental's request for production of documents her calculation of hours showing she worked 2,175 hours engaged in her principal work activities for Continental Airlines in the twelve months prior to her request for FMLA. After reviewing Continental's motion for summary judgment, Staunch

learned that she had understated her flight hours and as a result she actually worked 2,323 hours and 52 minutes for Continental in the twelve months preceding her request for leave. See Appendix F, p. 69a *et seq.*

Janie DeVito, Inflight Director for Continental, acknowledged that there are activities for the benefit of the employer that flight attendants are expected to perform, but are not included in the calculation of hours worked or monetary compensation paid to flight attendants. Monetary compensation is determined based upon the value of the schedule awarded to the flight attendant. That compensation is based upon "block hours." Block hours are measured from the time the main cabin door is closed upon departure to the time it is opened upon arrival at the destination. For the block time, flight attendants are paid an hourly rate. DeVito expressly acknowledged that there are additional duties that are performed outside the period between block in and block out such as reading items placed in employee's files, reviewing briefing books, reading monthly operational newsletters, meeting with supervisors, going through customs on international flights, and waiting onboard a plane when it is a through flight, that are not covered by the block in block out times that are reflected in Continental's records of employee hours worked.

DeVito contended at her deposition that much of the reading could be done by a flight attendant while in flight. She stated, "They can read it in the line of duty. That is, while I'm on the airplane being paid, I can read the material. That is an acceptable time frame for perusing that information." DeVito's

statement was directly contradicted by Continental's applicable policy that stated that flight attendants were not to read while on duty.

On January 26, 2007, the district court issued its Memorandum Opinion and Order together with its Judgment Entry denying Staunch's Motion for Summary Judgment and granting Continental's Motion for Summary Judgment and dismissing Staunch's Amended Complaint with prejudice. In its decision, the district court did not decide the question of whether Staunch was an eligible employee under the Family Medical Leave Act. The district court decision assumed she was an eligible employee and then decided the case on other grounds.

On February 8, 2007, Staunch filed an appeal to the Sixth Circuit Court of Appeals. No cross appeal was filed by Continental, but Continental argued in its brief that the decision of the district court granting summary judgment in favor of Continental should be affirmed on the alternative ground that Staunch was not an eligible employee under the Family Medical Leave Act because she did not work 1250 hours in the twelve months preceding her request for leave.

On January 7, 2008, the Sixth Circuit Court of Appeals affirmed the Judgment of the District Court granting summary judgment in favor of Continental on her FMLA claims on the alternative ground that Staunch was not an eligible employee under the FMLA because she had not worked 1250 hours in the twelve months preceding her request for leave. On January 22, 2008, Staunch filed a timely petition for rehearing en banc. The petition for rehearing was denied on

April 11, 2008. Staunch now submits this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THE SUPREME COURT.

A. BY REQUIRING STAUNCH TO PRODUCE EVIDENCE OF THE SPECIFIC DAYS AND HOURS THAT SHE WORKED IN ORDER TO MEET THE DEFINITION OF "ELIGIBLE EMPLOYEE" UNDER THE FAMILY MEDICAL LEAVE ACT, THE SIXTH CIRCUIT DECISION CONFLICTS WITH THE DECISION OF THE SUPREME COURT IN THE CASE OF *ANDERSON V. MT. CLEMENS POTTERY CO.*, 328 U.S. 680 (1946).

The Sixth Circuit panel ruled that Staunch was not an eligible employee under the FMLA because she had not worked 1250 hours in the twelve months prior to requesting leave. The court made this ruling even though Staunch submitted two sworn affidavits stating she worked more than 1250 hours for Continental in the 12 months preceding her request for intermittent Family Medical Leave due to he

pregnancy. In affirming the decision of the trial court on alternative grounds, the Sixth Circuit panel stated:

> Staunch attempts to refute Continental's calculations with an undated list of tasks and hours she compiled based on her own recollection. But Staunch failed to present evidence of specific days and hours that she worked performing these uncompensated tasks. This undated, generalized list does not set forth specific facts showing a genuine issue for trial.

The decision of the Sixth Circuit Panel discrediting Staunch's testimony because it did not include specific days and hours that she worked, is contrary to established United States Supreme Court precedent.

The Family Medical Leave Act specifically states that "For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) shall apply." 29 U.S.C. § 2611(2)(C).

In the case of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 at 686-688 (1946), the court considered the standard of proof necessary to support an employee's claim for unpaid overtime under the Fair Labor Standards Act. The court stated:

> The Circuit Court of Appeals further held that the burden rested upon the employees to prove by a preponderance of the evidence that they did not receive the wages to which they were

entitled under the Act and to show by evidence rather than conjecture the extent of overtime worked, it being insufficient for them merely to offer an estimated average of overtime worked. The cause of action accordingly was ordered to be dismissed.

But we believe that the Circuit Court of Appeals, as well as the master, imposed upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act. An employee who brings suit under § 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under § 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. See Note, 43 Col.L.Rev. 355.

The present case is a precise corollary to the *Mt. Clemens* case, the only difference being that this case

is brought under the FMLA rather than the FLSA. The FMLA itself and its governing regulations make it clear that "Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (see 29 C.F.R. Part 785)." 29 C.F.R. § 825.110.

In this case, the Sixth Circuit properly found that the employer failed to keep accurate records of the actual hours worked by Staunch. See Opinion of Sixth Circuit at p. 5. However, by holding that Staunch was required to produce "evidence of specific days and hours that she worked performing... uncompensated tasks," to establish her eligibility under the FMLA, rather than "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference," the Sixth Circuit erred in a manner inconsistent with Supreme Court precedent on a very important issue.

It is important for the Supreme Court to accept this petition because the holding of the Sixth Circuit is in contravention of the intent and purpose of the FMLA. The FMLA is intended to allow workers who have serious medical conditions to have job security when they need to be off work due to a serious health condition. Absences from work covered by the FMLA are not supposed to be used by employers as a negative factor in employment decisions. *Wysong v. Dow Chemical*, 503 F.3d 441 (C.A.6 Ohio 2007). If an employer takes an employment action based, in whole or in part, on the fact that the employee took FMLA-

protected leave, the employer has denied the employee a benefit to which he is entitled. *Wysong* at p. 447.

The applicable regulations make it apparent that where an employer fails to keep adequate records, the employee should be given the benefit of the doubt on eligibility determinations. 29 C.F.R. § 825.110 states in relevant part:

> In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (e.g., bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee is deemed to have met this test. See also § 825.500(f).

29 C.F.R. § 825.500 states in relevant part:

> (f) If FMLA-eligible employees are not subject to FLSA's record keeping regulations for purposes of minimum wage or overtime compliance (i.e., not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months

Flight attendants are exempt from the overtime provisions of the FLSA. Fair Labor Standards Act of 1938, § 13(b)(3), 29 U.S.C.A. § 213(b)(3); Railway Labor Act, § 1 *et seq.*, 45 U.S.C.A. § 151 *et seq.*; 29 C.F.R. § 786.1; *Thibodeaux v. Executive Jet Intern., Inc.*, 328 F.3d 742 (2003), 148 Lab.Cas. P 34,728, 8 Wage & Hour Cas.2d (BNA) 1063. Thus, in this case, Staunch was entitled to a presumption of FMLA eligibility. The circuit court, in holding Staunch to an improperly high standard of proof for establishing eligibility for coverage under the FMLA, committed a serious error in contravention of established precedent. As the circuit court erroneously held that an employee is required to produce evidence of the specific days and hours that she worked in order to meet the definition of "eligible employee" under the Family Medical Leave Act, this court should grant this petition for certiorari to correct the error and avoid needless and improper reduction of employees' opportunity to benefit from the protection Congress intended when it enacted the FMLA.

B. BY GRANTING SUMMARY JUDGMENT IN FAVOR OF CONTINENTAL DESPITE THE FACT THAT THE RECORD INCLUDED STAUNCH'S SWORN AFFIDAVIT DISPUTING CONTINENTAL'S CALCULATION OF HOURS AND STATING FROM HER PERSONAL KNOWLEDGE THAT SHE WORKED 2,323 HOURS FOR CONTINENTAL IN THE TWELVE

MONTHS PRECEDING HER REQUEST FOR FAMILY MEDICAL LEAVE, THE DECISION OF THE CIRCUIT COURT CONFLICTS WITH THE DECISION OF THE SUPREME COURT IN THE CASE OF *ANDERSON V. LIBERTY LOBBY, INC.*, 477 U.S. 242 (1986).

In the case of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the United States Supreme Court held that on a motion under Federal Rule of Civil Procedure 56, credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in her favor. Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Upon de novo review by a Court of Appeals, the legal standard is the same as it is before a trial court. *Bryson v. Regis Corp.*, 498 F.3d 561, 569 (6th Cir.2007).

Staunch testified that she did work over 1250 hours for Continental in the 12 months preceding her request for intermittent family medical leave. Paragraph 10 of her sworn affidavit executed on September 25, 2006, stated, "I had been employed for more than twelve months and had worked for at least 1250 hours with

Defendant during the twelve month period prior to the time I requested and took approved FMLA leave."

Continental disputed the fact that Staunch worked more than 1250 hours for Continental in the 12 months prior to requesting leave and submitted the Affidavit of Mary Sturchio, based upon her personal knowledge and certain business records of Continental, calculating that Holly Staunch's flight time, check-in time, ground time, de-brief time, and training from January 21, 2001 through January 22, 2002 totaled 1127 hours forty one minutes. See Appendix E, p. 64a *et seq.*

Staunch contested Sturchio's calculation of the number of hours worked. In her affidavit dated January 8, 2007, Staunch stated:

> 5. During the twelve months preceding my request for an intermittent family medical Leave of Absence from my employer, Continental Airlines, Inc., in January 2002, I performed at least 2,175 hours of work for the benefits of my employer Continental Airlines, Inc.
>
> 6. Attached hereto as Exhibit J is a compilation made upon personal knowledge indicating the time I recollect working for Continental in 2001.
>
> 7. At the time I made my compilation, I did not have Continental's records reflecting my flight hours. From the records attached to Defendant's Motion for Summary Judgment,

I learned that I underestimated the amount of flight hours worked. In fact, Continental's records reflect that I had 948 hours and 52 minutes of flight time rather than the 800 hours I previously recalled. Thus, I would upwardly adjust my hours worked in the twelve months preceding my request for leave to 2,323 hours and 52 minutes.

8. Continental's submission based upon the affidavit of Mary Sturchio does not reflect the actual hours I worked for Continental. For example, the Sturchio submission listed release time as 15 minutes for each duty day worked. In fact, work was performed after each flight segment and 15 minutes was not sufficient to perform the duties required.

9. Sturchio's submission listed forty five minutes for report time for a remain overnight layover, when in fact, I had to report at least one hour before the start of each day.

10. Sturchio's affidavit does not accurately reflect the time spent in recurrent training and in preparation for recurrent training.

11. Sturchio's affidavit does not include time for required computer work, manual revisions, review of briefing books, meetings with supervisors, time for making required liquor deposits as lead flight attendant, time going through customs or travel time spent on behalf of the employer.

12. Pursuant to Continental Airlines regulations, flight attendants were not permitted to read while on board the aircraft.

See Appendix F, pp. 70-75.

Staunch's contention that there were many activities for the benefit of her employer that she was required to perform but not included in the calculation of hours worked or monetary compensation paid to flight attendants was confirmed by Continental's In-flight Director, Janie DeVito.

Contrary to the rule stated in *Anderson v. Liberty Lobby, Inc.*, supra, that the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in her favor, the Sixth Circuit panel in this case found that Staunch's calculation was "inflated and unsupported," while Continental's calculation was "appropriate." Opinion at p. 5. It is impossible to make such determinations without weighing the evidence and judging the credibility of the witnesses.

As Continental contended that Staunch worked 1127 hours 52 minutes, leaving her 112 hours 8 minutes short of qualifying as an eligible employee under the FMLA, and the discrepancies identified by Staunch could more than make up the difference in the required number of hours, it was improper to grant summary judgment to Continental.

The Sixth Circuit panel based its decision on the "time required by the collective bargaining agreement for check-in, de-briefing, and ground time," and found

that four hours and fifteen minutes per day for two days of training was all the time Staunch spent on training because that was what she was paid for under the union contract. However, it was improper to limit Staunch to hours she was paid under the union contract, rather than the actual hours she spent in service to her employer. The workweek ordinarily includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place". *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). There need be no exertion at all and all hours are hours worked which the employee is required to give his employer. 29 C.F.R. § 785.7. These principles are applicable, even though there may be a custom, contract, or agreement not to pay for the time so spent. 29 C.F.R. § 785.8.

Applying the proper standard to the facts of the present case, and believing Staunch's evidence, there was a genuine issue of material fact as to whether Staunch worked 1250 hours for Continental in the 12 months prior to requesting intermittent family medical leave. The proper standard was applied in the case of *Jackson v. Rite Aid Corp.*, 2007 WL 2324951, at p. 2 (E.D.Mich. 2007) where the court stated:

> Despite Defendant's contention that Plaintiff has offered only conclusory and unsupported allegations, rooted only in speculation, Plaintiff has offered her own affidavit in which she attests to working a substantial number of hours. Yet, on a motion under Federal Rule of Civil Procedure 56, the Court must view the evidence and draw all reasonable inferences in

> favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Although Plaintiff does not provide a specific tally or precisely identify the exact dates on which she allegedly worked those unrecorded hours, construing her allegations in her favor results in the reasonable inference that her hours exceed 1,250 hours in the twelve months prior to her termination...Accordingly, the Court cannot grant Defendant summary judgment on that basis.

It must be noted that under the applicable FMLA regulations, "If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. 29 C.F.R. § 825.110(d). In this case, the leave form Staunch used to request leave specifically referenced the FMLA. Continental confirmed in writing that her request for leave had been approved. There is no evidence that Continental ever informed Staunch that she was ineligible for leave under the FMLA. These additional facts also support Staunch's contention that she was an eligible employee under the FMLA and therefore construing all of the evidence most strongly in her favor, summary judgment in favor of Continental was improper.

In December of 2007, Fed. R. Civ. P. 56 governing summary judgment was amended. However, the comments to the amendment noted that no substantive changes in the rule were intended. It is important for the court to accept this petition to reiterate that the standards for deciding a motion for

summary judgment have not been lowered by the amended rule. Since the decision of the circuit court severely departed from established Supreme Court precedent on the standard for deciding a motion for summary judgment, it is important for the court to accept jurisdiction over this matter.

II. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONFLICTS WITH OTHER COURTS OF APPEALS ON THE SAME IMPORTANT MATTER.

The Sixth Circuit Opinion in this case held that Staunch had to produce evidence of the specific days and hours that she worked in order to meet the definition of "eligible employee" under the Family Medical Leave Act. This holding conflicts with established precedent in other circuits. Many courts have approved of estimates by an employee of hours worked to satisfy the employee's burden of proof in cases brought under the Fair Labor Standards Act ("FLSA") seeking unpaid wages or overtime compensation. *Leatherbury v. Department of Army*, 524 F.3d 1293 (C.A.Fed. 2008).

An employee may testify as to the hours worked from his or her present memory and recollection alone. *Doo Nam Yang v. ABCL Corp.*, 427 F.Supp.2d 327, 335 (S.D.N.Y.2005); *Turner v. Human Genome Science, Inc.*, 292 F.Supp.2d 738, 748 (D.Md.2003) ("'a *prima facie* case can be made through an employee's testimony giving his recollection of hours worked ... [and his case] is not to be dismissed nor should recovery for back pay be denied, because proof of the number of hours worked is inexact or not perfectly

accurate.'") (quoting *Donovan v. Kentwood Development Co., Inc.*, 549 F.Supp. 480, 485 (D.Md.1982)).

Numerous decisions in the courts of appeals have upheld this principle. For example, in *Allen v. Board of Public Educ. for Bibb County*, 495 F.3d 1306 (11th Cir. 2007), the court stated,

> Thus, it is clear that the Board was not entitled to summary judgment based on Plaintiffs' lack of documentation and inability to state with precision the number of uncompensated hours they worked and the days on which that work was performed. We believe that Plaintiffs have produced "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *See Anderson*, 328 U.S. at 687, 66 S.Ct. 1187.

In *Brock v. Seto*, 790 F.2d 1446 (9th Cir.1986); *cert. denied,* sub nom. the court found that employees' testimony that they worked over forty hours was sufficient to find in favor of the employees on their overtime claim under the FLSA. The circuit court found that:

> The district court's determination that the damages were too speculative ignored the legal standard established in *Mt. Clemens Pottery*: "Unless the employer can provide accurate estimates [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence." *Id.* 328 U.S. at 693, 66 S.Ct. at 1195.

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The district court failed to fulfill its duty in ascertaining back wages.

In *Arias v. U.S. Services Industries, Inc.*, 80 F. 3d 509 (C.A.D.C. 1996), the court held:

> In light of the evidentiary difficulties appellants faced as a result of USSI's failure to maintain accurate time and payment records by workweek, and to denominate clearly the number of hours being compensated by some payments, appellants' construction and presentation of Exhibit 16 is sufficient to establish an amount and extent of work and wages as a matter of just and reasonable inference as contemplated by *Mt. Clemens*. We find nothing unduly speculative about the inferences drawn by Ms. Collins in creating Exhibit 16 as a summary of the voluminous time and payroll records, especially in light of the employer's complete failure to comply with the law in maintaining payroll records. "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had [it] kept records in accordance with the requirements of ... the [FLSA]." *Id.* at 688, 66 S.Ct. at 1192-93. The burden is now on USSI to come forward with evidence supporting its own counter-estimates of appellants' overtime hours and wages; unless USSI is able to present such evidence, judgment must be entered for appellants in the amounts specified in Exhibit 16, "even though the result be only approximate." *Id.*

In *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (C.A.5 Tex. 1985). the court held:

> Where precise evidence of hours worked by each migrant worker was not available due to failure of both registered farm labor contractor and farmer to keep adequate records, workers could satisfy their burden under Fair Labor Standards Act [29 U.S.C.A. § 201 et seq.] of producing some evidence to show amount and extent of violation with admittedly inexact or approximate evidence.

Even the prior decisions of the Sixth Circuit dealing with claims for overtime under the FLSA have acknowledged that evidence of specific days and hours worked performing uncompensated tasks is not necessary if the employee produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. In *Hodgson v. American Concrete Const. Co., Inc.*, 471 F.2d 1183 (C.A.6, 1973), the court held that a compliance officer's imprecise estimates of time worked were competent evidence of hours worked. The court stated:

> Although it is for the trial judge to determine from all he hears and sees the weight to be accorded the compliance officer's computations, they are relevant and competent evidence and should be admitted and considered on retrial of this case. *Cf. Hodgson v. Elm Hill Meats of Kentucky*, 6th Cir., 1972, 463 F.2d 1186, aff'g. E.D.Ky.1971, 327 F.Supp. 1009; *Hodgson v. Humphries*, 10th Cir. 1972, 454 F.2d 1279; *Wirtz v. Turner*, 7th Cir. 1964, 330 F.2d 11.

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> Moreover, the district court must be guided by the teaching of the Supreme Court that "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes . . . [t]he solution . . . is not to penalize the employee by denying him any recovery . . .

It is important for the Supreme Court to hear this petition to make it clear that where the employer's records of hours worked are not complete or accurate, competent evidence of hours worked under the FLSA is also competent evidence of hours worked for the purpose of establishing FMLA eligibility. As the decision of the Sixth Circuit discrediting Staunch's sworn testimony because it did not include specific days and hours that she worked, conflicts with the cited decisions, the Appellant respectfully requests the court to grant this petition for a writ of certiorari to the Supreme Court.

CONCLUSION

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CONCLUSION

For the reasons stated herein, Staunch respectfully requests the court to grant her request to review the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

RECOMMENDED FOR
FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0004p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-3315

[Filed January 7, 2008]

HOLLY L. STAUNCH,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CONTINENTAL AIRLINES, INC.,	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 06-01011—James S. Gwin, District Judge.

Argued: November 29, 2007
Decided and Filed: January 7, 2008

Before: KENNEDY, MARTIN, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Martin S. Hume, Youngstown, Ohio, for Appellant. Janette M. Louard, LITTLER MENDELSON, Cleveland, Ohio, for Appellee. **ON BRIEF:** Martin S. Hume, Youngstown, Ohio, for Appellant. Janette M. Louard, Lisa A. Cottle, LITTLER MENDELSON, Cleveland, Ohio, for Appellee.

OPINION

KENNEDY, Circuit Judge. Plaintiff Holly Staunch appeals the district court's grant of summary judgment to Defendant Continental Airlines, Inc. on her claims for interference and retaliation under the Family Medical Leave Act of 1993 ("FMLA"), pregnancy discrimination in violation of Section 4112.02(A) of the Ohio Revised Code, and wrongful termination in violation of Ohio's public policy against pregnancy discrimination. Because we find that Staunch was not an "eligible employee" under the FMLA and her state law claims are without merit, we **AFFIRM** the district court's grant of summary judgment to Continental.

BACKGROUND

Continental hired Staunch as a flight attendant in May 1998. For most of her employment, Staunch worked as a reserve flight attendant. As such, she was

on-call and could receive flight assignments up to two hours prior to departure.

In January 2002, Staunch discovered she was pregnant and requested intermittent leave from Continental, which it granted. In April 2002, Staunch called-in sick to work on at least four occasions after Continental had assigned her in-flight duties. On May 1, 2002, Staunch was placed on maternity leave. She remained out until the end of January 2003.

In May 2003, Staunch had two "Sick After Assignment" ("SKAA") incidents and two or more "Sick" ("SK") incidents. Based on these absences, Staunch's supervisor, Kimberly Piszczek, set up a meeting to discuss Staunch's attendance record and other job performance issues. During the meeting, which took place on September 18, 2003,[1] Piszczek issued Staunch a "Termination Warning." Staunch was informed that any additional infractions during the next eighteen months would result in termination of her employment. On September 21, 2003, Continental sent Staunch a "Termination Warning" letter that read, in part:

> A review of your 12-month active work history indicate[s] the following instances of unacceptable attendance.

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[1] The meeting occurred on this date and not earlier because it was Staunch's first day back at work following a non-medical leave of absence that began in mid-May 2003.

Sick September 28 – October 7, 2001 (Issued Informal Conversation)

Sick call after Assignment Dec. 6, 2001

Sick Dec. 28, 2001 – Jan. 2, 2002 (Issued Written Warning)

Sick Feb. 24, 2002 / Sick Call After Assignment Feb. 25, 2002

Short Notice Sick March 28, 2002

Sick call after Assignment April 10, 11, 12, 2002

Sick Call After Assignment April 27, 2002

Sick Call After Assignment May 6, 2003

Sick May 7, 2003

Sick Call After Assignment May 8, 2003

Sick May 10-12, 2003

. . .

As a result of these facts and in light of your work history, which have been considered in arriving at a decision in this matter, you are placed on Termination Warning effective September 18, 2003 for 18 months of active service.

> . . . [W]hen a Flight attendant reaches Termination Warning the Flight Attendant will be on a single track for discipline purposes. Any infraction in Job Performance or Dependability may lead to termination of employment.

On December 28 and 29, 2003, Staunch incurred a holiday sick instance without producing a doctor's note. Although her holiday sick call could have subjected her to termination, Continental chose to have an informal conversation with Staunch rather than end her employment.

On April 22, 2004, it was discovered that Staunch had flown a number of days over the course of almost five months without a compliant safety manual. Specifically, Staunch had failed to update her manual with Revision 23, a December 10, 2003 Federal Air Regulations("FAR") safety and operations update. Supervisor Piszczek spoke with Staunch and, ultimately, allowed her to fly on that day.

On April 29, 2004, Piszczek and union representatives met with Staunch to inform her that Continental had decided to terminate her employment on the basis of her job performance and dependability violations. Following the meeting, Piszczek sent Staunch a termination letter stating in part:

> Thank you for meeting with me on April 29, 2004 to discuss a Job Performance related issue. . . . A review of your 12-month active work history indicates the following:

Sick Call After assignment April 10, 11, 12, 2002

Sick Call After Assignment April 27, 2002

Sick Call After Assignment May 6, 2003

Sick May 7, 2003

Sick Call After Assignment May 8, 2003

Sick May 10-12, 2003 (Issued Termination Warning)

Sick December 28-29 (Informal Conversation)

Infraction of FAR 121.137 Missing Revision 23 dated December 10, 2003

Since the issue of termination warning you have incurred a sick instance and a job performance instance.

At your check in on April 22, 2002, it was determined by me that you did not have revision 23 in your manual. Nor was your signature on the Revision Summary Record. You admitted during our meeting you were not sure if Revision 23 was in your manual. Your work schedule shows you have flown 5 months in noncompliance. I explained to you that either one of the above single issues could have led to termination of your employment.

> As a result of the facts listed above and in light of your work history, which have been considered in arriving at a decision in this matter you employment with Continental Airlines is terminated effective April 29, 2004.

Staunch grieved her discharge through Continental's arbitration procedure. Her grievance was denied. She also filed a charge of discrimination with the Ohio Civil Rights Commission, which issued a no probable cause determination. Thereafter, Staunch filed the present action against Continental alleging (1) FMLA interference; (2) FMLA retaliation; (3) pregnancy discrimination; and (4) wrongful discharge in violation of public policy.

The district court granted Continental's motion for summary judgment and dismissed Staunch's claims. Staunch filed this timely appeal of the district court's decision.

ANALYSIS

We review a district court's grant of summary judgment *de novo*. *Bryson v. Regis Corp.*, 498 F.3d 561, 569 (6th Cir. 2007). Summary judgment is appropriate if the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). When reviewing a motion for summary judgment, we must view the facts and draw all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Once the moving party demonstrates an absence of a genuine issue of material fact as to an

essential element of the non-moving party's case, the nonmoving party must set forth specific facts showing a triable issue. *Id.* It is not sufficient for the party opposing summary judgment to present a "mere scintilla" of evidence; the evidence must be such that a reasonable jury could find in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

I.

Staunch claims that Continental both interfered with her FMLA rights and retaliated against her for exercising her FMLA rights. The FMLA guarantees "eligible employees" twelve weeks of unpaid leave during any twelve month period for certain family or medical events, including childbirth. 29 U.S.C. § 2612(a)(1) (2000). The statute defines "eligible employee" as "an employee who has been employed . . . for at least 12 months by the employer with respect to whom leave is requested . . . and . . . for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). The statute makes it unlawful for employers to interfere with, restrain, or deny these rights, 29 U.S.C. § 2615(a)(1), and to retaliate against employees who exercise them, 29 U.S.C. § 2615(a)(2); violators are subject to consequential damages and appropriate equitable relief. 29 U.S.C. § 2617(a)(1).

As an initial matter, a FMLA claim cannot be maintained by a plaintiff who was not an "eligible employee." *Humenny v. Genex Corp., Inc.*, 390 F.3d 901, 905-06 (6th Cir. 2004). The parties dispute whether Staunch qualified as an "eligible employee" under the FMLA when she sought leave related to her

pregnancy beginning on January 21, 2002. Continental asserts that Staunch did not work 1,250 hours in the twelve months preceding her request for intermittent leave. Continental proffered the affidavit of Mary Sturchio, Manager of Human Resources, with an attached chart calculating Staunch's total hours worked for Continental from January 21, 2001 through January 22, 2002 as 1,127 hours and 41 minutes. Sturchio based her calculations on Continental records and factored in flight time, check-in time, ground time, de-brief time, and training time. Staunch maintains that she worked more than 1,250 hours. To support her contention, Staunch offered her sworn affidavit stating that she worked 2,323 hours and 52 minutes during the twelve months preceding her request for leave. Her calculations were based on her own recollection of the hours she had worked and were displayed in an undated list of task and hours. The district court did not decide whether Staunch had worked the requisite 1,250 hours for Continental; rather, it assumed that she was an eligible employee and granted summary judgment to Continental because her interference and retaliation claims had no basis in law.

To determine if an employee has worked the requisite 1,250 hours for his employer, the FMLA directs courts to examine the principles for calculating hours of service established under the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 2611(2)(C).[2] "The

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[2] The regulations set forth at 29 C.F.R. § 785 discuss the principles involved in determining what constitutes working time for purposes of FLSA, as well as our analysis of FMLA's hours of

determining factor is the *number of hours an employee has worked* for the employer within the meaning of the FLSA. . . . Any accurate accounting of *actual hours worked* under FLSA's principles may be used." 29 C.F.R. § 825.110(c) (emphasis added). If the "employer does not maintain an accurate record of hours worked by an employee . . . the employer has the burden of showing that the employee has not worked the requisite hours." *Id.*

In the present case, Staunch argues that Continental did not "maintain" an accurate record of her actual hours worked. Staunch does not dispute that Continental kept proper and accurate time records; rather, she argues that because compensation for flight attendants is based on predetermined flight hours, Continental's time records do not accurately reflect her actual time worked. In her deposition, Janie DeVito, Continental's Inflight Director, acknowledged that flight attendants are required to perform additional duties outside of the "block hours" from the time the main cabin door on the aircraft is closed upon departure to the time it is opened upon arrival at the destination. These duties include reading items placed in employees' files, reviewing briefing books, attending training sessions, meeting with supervisors for disciplinary meetings, going through customs on international flights, and waiting onboard a plane while passengers disembark ("de-brief time"). Because

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service requirement. The regulations direct a finding that "all hours are hours worked which the employee is required to give his employer." 29 C.F.R. § 785.1 (citing *Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

some of these duties necessarily must take place outside of the flight hours on which compensation is based, we find that Continental did not "maintain" a record of the actual hours spent performing these duties. Thus, Continental has the burden to prove that Staunch did not work the requisite 1,250 hours.

We find that Continental has clearly demonstrated that Staunch did not work 1,250 hours in the twelve months preceding her request for leave. In Mary Sturchio's Affidavit, Continental established Staunch's actual hours worked as 1,128 by compiling the flight attendant pay registers detailing each flight Staunch worked and adding time required by the collective bargaining agreement for check-in, de-briefing, training time, and ground time. Staunch attempts to refute Continental's calculations with an undated list of tasks and hours she compiled based on her own recollection. But Staunch failed to present evidence of specific days and hours that she worked performing these uncompensated tasks. This undated, generalized list does not set forth specific facts showing a genuine issue for trial.

Moreover, when viewed in light of the record evidence, Staunch's general allegations regarding the additional hours she worked prove to be inflated and unsupported. For example, flight attendants are required to check-in anywhere from 45 minutes to 1 hour and 15 minutes before the flight depending on the size of the plane to which they are assigned. In its calculations, Continental credited Staunch the appropriate amount of check-in time for each of the approximately 140 flights she worked during the relevant twelve-month period. Nevertheless, Staunch

alleged that she was entitled to an additional 250 hours of check-in time based on her own estimations. Continental, however, had already included that time in its calculation of hours worked. Moreover, even if Staunch is allotted one hour of check-in time as she alleges for each of the flights she worked, she would only be entitled to 140 hours of check-in time and not the 250 hours she estimated. Similarly, Staunch claimed that she was due an additional five hours for "customs/immigration processing in Canada, Mexico, Caribbean." But Continental's flight records show that during the relevant time period, Staunch made only two trips to Canada, and none to Mexico or the Caribbean. Any time Staunch spent in customs in Canada is covered by check-in time and was included in Continental's calculation of actual hours worked.

Therefore, we find that Staunch has failed to present sufficient evidence to create a genuine issue of fact as to the number of hours she actually worked during the twelve-month period preceding her request for leave. Continental's evidence showing that Staunch worked less than the requisite 1,250 hours stands unrefuted. Thus, Staunch was not an "eligible employee" under the FMLA and her FMLA claims fail as a matter of law.

II.

Staunch also claims that Continental discriminated against her because of her pregnancy in violation of Ohio law. Ohio Revised Code Section 4112.02(A), like Title VII of the Civil Rights Act of 1974, prohibits an employer from discriminating against an employee because of the employee's sex. This includes

discriminating on the basis of "pregnancy, any illness arising out of and occurring during the course of pregnancy, childbirth, or related medical conditions." OHIO REV. CODE § 4112.01(B). The Ohio Supreme Court has held that "federal case law interpreting Title VII . . . is generally applicable to cases alleging violations of R.C. Chapter 4112." *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 471-72 (6th Cir. 2005) (quoting *Plumbers & Steamfitters Joint Apprenticeship Comm'n v. Ohio Civil Rights Comm'n*, 421 N.E.2d 128, 131 (Ohio 1981)). Thus, because Staunch has failed to present direct evidence of pregnancy discrimination, her claim is subject to the *McDonnell Douglas* burden-shifting framework applied in Title VII discrimination claims. *Tysinger v. Police Dep't of the City of Zanesville*, 463 F.3d 569, 572-73 (6th Cir. 2006). At the outset, Staunch has the burden of presenting evidence from which a reasonable jury could conclude that: (1) she was pregnant; (2) she was qualified to perform her job; (3) she was subjected to an adverse employment decision; and (4) there was a nexus between her pregnancy and the adverse employment decision. *Id.* at 573. If Staunch satisfies her *prima facie* showing, then the burden shifts to Continental to offer evidence of a legitimate, non-discriminatory reason for the adverse employment action. *Id.* at 576. Once Continental proffers such a reason, the burden shifts back to Staunch to show that the proffered reason was a pretext for retaliation. *Id.*

While Staunch has arguably presented sufficient evidence to establish her *prima facie* case, she has failed to present any evidence to create a genuine issue that Continental's legitimate, nondiscriminatory reason for her termination was a pretext for pregnancy

discrimination. Staunch may demonstrate pretext by showing that Continental's proffered reasons (1) have no basis in fact; (2) did not actually motive the action; or (3) were insufficient to warrant the action. *Tysinger*, 463 F.3d at 576. Staunch does not dispute that the reasons advanced by Continental for her discharge have a basis in fact because she admits that she had accumulated non-pregnancy related absences and her flight manual was not up to date. Staunch argues, though, that her non-pregnancy absences were insufficient to warrant the decision to place her on Termination Warning, and had she not been on Termination Warning when she was found flying with a non-compliant manual in violation of company policy and federal regulations, she would not have been terminated.

Staunch claims that because Continental's attendance policy provided that an absence or incident is defined as any specific period of absence from work for a single reason, her absence from work May 6–12, 2003, which she alleges was for a single reason, would only count as one sick incident. She argues that this would not have been sufficient to place her on Termination Warning without the inclusion of her pregnancy related absences. Therefore, Staunch argues that Continental's explanation that she was placed on Termination Warning for her non-pregnancy absences was pretextual.

While Continental's Inflight Director, Janie Devito acknowledged that it is Continental's policy to count a sick incident as any specific period of absence from work for a single reason, she also explained that "[o]ne sick call instance may include a number of days if the

employee identifies those days when calling in sick. Each new call results in a new sick instance." In her deposition, Staunch testified that she called in sick after receiving an assignment on May 6. When questioned, she could not recall whether she had let Continental know at that time that she would be absent the following day or whether she called in sick again on May 7. Staunch admitted, however, that she called in sick after assignment on May 8. Again, she could not recall making a phone call to Continental on May 10, 11, or 12 to let them know that she was still sick. Tellingly, when asked if she had called in on May 6 and told Continental she would be absent from work until May 12, Staunch hedged before eventually admitting that she had not done so. Therefore, according to Continental's policy, Staunch incurred at least two SKAA incidents and two or more SK incidents in May 2003.

These absences, coupled with the fact that Staunch had previously received a Written Warning for attendance, were sufficient to place Staunch on Termination Warning. Staunch knew that her employment would be terminated if she incurred one more infraction during the eighteenmonth period in which her Termination Warning was in effect. Despite this, Staunch incurred another SK incident on December 28–29, 2003, without providing a doctor's note. The fact that Continental chose to give Staunch a final reprieve is strong evidence that it's final decision to terminate her employment in April 2004 for flying with a non-compliant safety manual was not a pretext for pregnancy discrimination. Thus, we find that Staunch has failed to present any evidence to create a genuine issue that Continental's legitimate,

non-discriminatory reason for her termination was insufficient to warrant the action.

Therefore, Continental is entitled to summary judgment on Staunch's pregnancy discrimination claim.

III.

Finally, Staunch argues that Continental wrongfully terminated her in violation of Ohio's public policy against pregnancy discrimination. We find, however, that Staunch cannot maintain a claim for wrongful discharge in violation of Ohio's public policy because she was not employed at will, but was employed pursuant to the terms of a collective bargaining agreement. *Haynes v. Zoological Soc'y of Cincinnati*, 652 N.E.2d 948, 951 (Ohio 1995) ("[I]n order for an employee to bring a cause of action pursuant to *Greely* [i.e., a claim for wrongful discharge in violation of public policy], that employee must have been an employee at will."); *see also Klepsky v. United Parcel Serv., Inc.*, 489 F.3d 264, 270-71 (6th Cir. 2007) (finding plaintiff, a union member, could not maintain a *Greely* claim because he was not an employee at will). Even if she could plead such a claim, Staunch's failure to present sufficient evidence to support the essential elements of her pregnancy discrimination claim likewise precludes her ability to establish a public policy claim. *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 375 (6th Cir. 1999); *DeSanzo v. Titanium Metals Corp.*, 351 F. Supp.2d 769, 782-83 (S.D. Ohio 2005) ("A claim for wrongful discharge in violation of public policy embodied in statute prohibiting discriminatory practices will fail if the

underlying discrimination claim fails."). Therefore, we find that Continental is entitled to summary judgment on Staunch's claim for wrongful termination in violation of Ohio public policy.

CONCLUSION

For the aforementioned reasons, we **AFFIRM** the district court's decision.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-3315

[Filed January 7, 2008]

HOLLY L. STAUNCH,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CONTINENTAL AIRLINES, INC.,	)
Defendant-Appellee.	)
	)

Before: KENNEDY, MARTIN, and CLAY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 1:06-CV-1011

[Filed January 26, 2007]

HOLLY L. STAUNCH,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CONTINENTAL AIRLINES, INC.,	)
	)
Defendant.	)
	)

OPINION & ORDER
[Resolving Docs. No. 6, 21, 34, 39]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

With this Opinion and Order, the Court considers three motions that allege and deny violations of three federal and state laws. These motions center on whether a flight attendant has alleged a valid pregnancy discrimination claims against her former employer.

In the underlying lawsuit, Plaintiff Holly L. Staunch ("Staunch") sues Defendant Continental Airlines, Inc. ("Continental") for "interference" and "retaliation" under the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, pregnancy discrimination in violation of Section 4112.02(A) of the Ohio Revised Code, and violation of Ohio's public policy against pregnancy discrimination. [Docs. 1, 17.] Continental denies Staunch's allegations and raises affirmative defenses. [Docs. 5, 18.]

In addition to answering Staunch's complaint, Continental moves to dismiss Staunch's entire lawsuit as preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and, alternatively, her FMLA claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Doc. 21; Staunch opposes this motion, Doc. 29. Staunch moves for partial summary judgment on her Ohio pregnancy discrimination claim, Doc. 39; Continental opposes this motion, Doc. 44. Continental moves for summary judgment on Staunch's entire law suit, repeating the legal theories presented in its motion to dismiss and adding new arguments against Staunch's state law claims, Doc. 34; Staunch opposes this motion, Doc. 46.

For the reasons presented below, the Court **DENIES** Continental's amended motion to dismiss, **DENIES** Staunch's motion for partial summary judgment, **GRANTS** Continental's motion for summary judgment, and **DISMISSES** Staunch's claims against Continental. Further, as a result of this Opinion and Order, Continental's original motion to dismiss is **MOOT**.

I. Background

Continental hired Staunch as a flight attendant in early 1998. [Docs. 1, 6, 9, 17, 21.] In January 2002, Staunch became pregnant and requested FMLA leave from Continental, which Defendant granted. [Docs. 1, 5, 6, 17, 18, 21, 29, 41.] In April 2002, during the course of her FMLA leave period in April 2002, Staunch called-in sick to work on at least four occasions after Continental had assigned her in-flight duties. [Doc. 6, at Exh. A.] The record does not reflect the date of expiry of Staunch's FMLA leave period.

Following her spate of absenteeism in April 2002, Staunch appears to have good attendance until May 2003. On May 6 and 8, 2003, Staunch recorded "Sick Call After Assignment" incidents. *See, e.g.*, Doc. 6, at Exh. A. On May 7, 10, 11, and 12, 2003, Staunch recorded "Sick" incidents. *Id.* Based on these May 2003 absences, Staunch's In-Flight Supervisor, Kimberly Piszczek, issued Staunch a "Termination Warning." *See, e.g.*, Doc. 41, at Exh. F. In September 2003, Continental met with Staunch to discuss her May 2003 absences and other job performance issues. *Id.* On September 21, 2003, Continental sent Staunch a "Termination Warning" letter that read, in part:

> A review of your 12-month active work history indicate[s] the following instances of unacceptable attendance.
>
> > Sick September 28 - October 7, 2001 (Issued Informal Conversation)
> >
> > Sick call after Assignment Dec. 6, 2001

Sick Dec. 28, 2001 - Jan. 2, 2002 (Issued Written Warning)

Sick Feb. 24, 2002 / Sick Call After Assignment Feb. 25, 2002

Short Notice Sick March 28, 2002

Sick call after Assignment April 10, 11, 12, 2002

Sick Call After Assignment April 27, 2002

Sick Call After Assignment May 6, 2003

Sick May 7, 2003

Sick Call After Assignment May 8, 2003

Sick May 10-12, 2003

. . .

As a result of these facts and in light of your work history, which have been considered in arriving at a decision in this matter, you are placed on Termination Warning effective September 18, 2003 for 18 months of active service.

. . . when a Flight attendant reaches Termination Warning the Flight Attendant will be on a single track for discipline purposes. Any

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> infraction in Job Performance or Dependability may lead to termination of employment.

[Doc. 41, at Exh. F.]

On December 28 and 29, 2003, Staunch violated her "Termination Warning" by recording two "Sick" incidents. [Doc. 6, at Exh. A.] Although Staunch's December 2003 absences could have subjected her to termination, Continental chose to "informally counsel" her rather than end her employment. *Id.* However, on April 22, 2004, Supervisor Piszczek discovered that Staunch failed to include "Revision 23," a December 10, 2003 Federal Aviation Regulation ("FAR") safety and operations update, in her In-Flight Manual. *Id.* Piszczek spoke with Staunch and, ultimately, allowed her to fly on that day. *Id.*

On April 29, 2004, Supervisor Piszczek and union representatives met with Staunch to inform her that Continental had decided to terminate her employment on the basis of her job performance and dependability violations. [Doc. 6, at Exh. A.] Following the meeting, Supervisor Piszczek sent Staunch a termination letter that stated, in pertinent part:

> Thank you for meeting with me on April 29, 2004 to discuss a Job Performance related issue. . . . A review of your 12-month active work history indicates the following:
>
> > Sick Call After assignment April 10, 11, 12, 2002
> >
> > Sick Call After Assignment April 27, 2002

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Sick Call After Assignment May 6, 2003

Sick May 7, 2003

Sick Call After Assignment May 8, 2003

Sick May 10-12, 2003 (Issued Termination Warning)

Sick December 28-29, 2003 (Informal Conversation)

Infraction of FAR 121.137 Missing Revision 23 dated December 10, 2003

Since the issue of termination warning you have incurred a sick instance and a job performance instance.

At your check in on April 22, 2002, it was determined by me that you did not have revision 23 in your manual. Nor was your signature on the Revision Summary Record. You admitted during our meeting you were not sure if Revision 23 was in your manual. Your work schedule shows you have flown 5 months in noncompliance. I explained to you that either one of the above single issues could have led to termination of your employment.

As a result of the facts listed above and in light of your work history, which have been considered in arriving at a decision in this

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matter your employment with Continental Airlines is terminated effective April 29, 2004 . . .

[Doc. 6, at Exh. A.]

Staunch grieved her termination through Continental's arbitration procedure and, thereafter, filed the actions underlying the instant motions in this Court. In her lawsuit, Staunch says that Continental impermissibly included her April 2002 FMLA leave as factors in its April 29, 2004 decision to terminate her employment and, in doing so, violates her federal and state protections against pregnancy discrimination. [Docs. 1, 17.]

Continental denies Staunch's allegations and asserts that its September 2003 decision to place her on "Termination Warning" resulted from Staunch's May 2003 work absences. [Docs. 5, 18.] Continental also says that its April 29, 2004 decision to terminate Staunch's employment resulted from her post-"Termination Warning" incidents, i.e., her work absences in December 2003 and failure to include "Revision 23" in her In-Flight Manual. *Id.*

In its amended answer, amended motion to dismiss, and motion for summary judgment, Continental offers substantial documentary and testimonial evidence to establish that Staunch's April 2002 FMLA leave did not precipitate her April 29, 2004 firing. *See, e.g.*, Docs. 18, 21, 31, 43, 44, 47. Staunch offers similar, albeit less fulsome and consistent, evidence in her pleadings and responsive motions. *See, e.g.*, Docs. 17, 29, 39, 40, 41, 42, 46, 49.

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The Court considers, in turn, each of Continental's amended motion to dismiss, Staunch's motion for partial summary judgment, and Continental's motion for summary judgment.

II. Legal Standard

A court may grant a motion to dismiss only when "it appears beyond doubt" that the plaintiff fails to state any claim upon which relief may be Granted. FED. R. CIV. P. 12(b)(6); *Conley v. Gibson*, 355 U.S. 41, 45 (1957). In deciding a motion to dismiss under Rule 12(b)(6), a court accepts as true all factual allegations in the complaint and construes any well-pleaded factual allegations in the plaintiff's favor. *See, e.g.*, *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). In assessing the plaintiff's allegations, a court need not accept as true "bare assertion[s] of legal conclusions." *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). A court may find a motion to dismiss "premature" when a defendant files it before the initial conference of parties or close of preliminary discovery. *See, e.g.*, *Omnicare, Inc. v. Provider Servs., Inc.*, 2006 U.S. Dist. LEXIS 6497 (N.D. Ohio Feb. 21, 2006).

A court appropriately grants summary judgment where the evidence submitted shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party's case. *Waters v. City of Morristown*, 242 F.3d 353, 358 (6th Cir. 2001). A fact is material if

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its resolution will affect the outcome of the lawsuit. *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 597 (6th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

Once the moving party satisfies its burden, the non-moving party must set forth specific facts showing a triable issue. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It is not sufficient for the non-moving party merely to show that there is some existence of doubt as to the material facts. *Id.*

In deciding a motion for summary judgment, a court views the factual evidence and draws all reasonable inferences in favor of the non-moving party. *Nat'l Enters., Inc. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997). Ultimately, a court must decide "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996) (internal quotations omitted).

III. Analysis

The Court examines Continental's amended motion to dismiss, Staunch's motion for partial summary judgment, and Continental' s motion for summary judgment.

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A. Continental's Amended Motion to Dismiss

1. The RLA Does Not Preempt Staunch's "Entire Lawsuit"

To promote stability in labor-management relations, Congress passed the RLA, which establishes a mandatory arbitral regime for "minor" disputes. 45 U.S.C. § 184; *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994). "Minor disputes" involve controversies over the interpretation of an existing collective bargaining agreement in a particular fact situation and pertain only to disputes invoking these contract-based rights. *Hawaiian Airlines*, 512 U.S. at 252-54. A court may resolve labor questions arising under federal or state statutory law if the underlying factual issues do not require the court to construe an existing collective bargaining agreement. *See, e.g., Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 411 (1988).

Continental advances the unsupported contention that the conflict over Staunch's firing is a "minor dispute" that must be resolved only through the RLA mechanisms, including Defendant's internal dispute-resolution processes and adjustment board. As such, Continental says that the RLA preempts Staunch's federal and state law claims because the collective bargaining agreement sets forth standards and procedures for determining whether to fire a flight attendant on the basis of her attendance record and safety violations. Continental further argues that Staunch's claims depend wholly on the Court's interpretation of the collective bargaining agreement, which the RLA preempts the Court from undertaking.

Although it makes this argument, Continental fails to identify any relevant and specific collectively bargained provision directly at-issue in this case. And, apart from their interpretation of whether Continental had "just cause" for Staunch's discharge, Defendant's adjustment board never interpreted any collective bargaining provision in the context of Staunch's federal and state law claims.

The Court disagrees with Continental's founded characterization of Staunch's complaint as a "minor dispute" under the RLA. Staunch's FMLA claim arises under a federal law that exists independent of Continental's collective bargaining agreement. By asserting an FMLA claim in her amended complaint, Staunch seeks to enforce a federal statutory right, not a contractual right embodied in the collective bargaining agreement. The Court can resolve Staunch's claim through a federal statute and without any reference to the collective bargaining agreement. Consequently, the RLA does not preempt Staunch's FMLA claim in this Court. Because Staunch's employment discrimination claim arises under federal law, not the collective bargaining agreement, the RLA does not preempt the claim.

Nor does the RLA preempt Staunch's state law claims. The Supreme Court has specifically rejected the contention that the RLA broadly preempts state-law claims based on discharge or discipline. *See, e.g.*, *Hawaiian Airlines*, 512 U.S. at 257. To prevail on its contention that the RLA broadly preempts Staunch's state law claims based on discharge or discipline, Continental needs to demonstrate that Plaintiff's "firmly rooted" her claims in a breach of the collective

bargaining agreement itself. *Id.* (citation omitted). Continental does not make such an argument. Instead, the carrier argues that the RLA completely preempts state law where Staunch's claim "is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and the RLA." *Beard v. Carrollton R.R.*, 893 F.2d 117, 121 (6th Cir. 1989).

Continental fails to recognize that the Sixth Circuit rejects *Beard*'s "complete preemption" argument except "in those situations where Congress has indicated an intent to occupy the field so completely that any ostensibly state claim is in fact a federal claim for purposes of arising-under jurisdiction." *See Roddy v. Grand Trunk W. R.R.*, 395 F.3d 318, 324 (6th Cir. 2005) (quoting *AmSouth Bank v. Dale*, 386 F.3d 763, 776 (6th Cir. 2004). Nor has Congress indicated its intent to "occupy the field" of anti-discrimination protections arising under Ohio law. Staunch brings her pregnancy discrimination and wrongful termination claims under valid Ohio statutes and common laws, not the collective bargaining agreement. Consequently, the RLA does not "completely preempt" Staunch's state law claims.

2. Continental's Rule 12(b)(6) Argument is Unavailing

The FMLA's central provision guarantees "eligible employees" twelve weeks of unpaid leave during a one-year period following certain events, including childbirth. 29 U.S.C. § 2612(a)(1). *See also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). The statute defines "eligible employee" as "an employee

who has been employed . . . for at least 12 months by the employer with respect to whom leave is requested . . . and . . . for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A)(i), (ii). The statute makes it unlawful for an employer to interfere with, restrain, or deny the exercise of these rights, 29 U.S.C. § 2615(a)(1), and subjects violators to consequential damages and appropriate equitable relief, 29 U.S.C. § 2617(a)(1).

In her amended complaint, Staunch alleges claims for interference with her FMLA rights and Continental's retaliation against her in violation of the FMLA. To prevail in its motion to dismiss Staunch's "interference" and "retaliation" claims, Continental must establish that it "appears beyond a reasonable doubt that [Staunch] fails to state any claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). *See also Conley*, 355 U.S. at 45. Continental does not do so with its amended motion to dismiss.

Staunch pleads her status as a former employee of Continental who sought and received FMLA intermittent leave. The parties do not contest that, sometime in January 2002, Staunch became pregnant and informed Continental of her new medical needs. Likewise, the parties agree that Continental terminated Staunch on April 29, 2004 based, in part, on her absenteeism. In deciding Continental's instant motion to dismiss, the Court accepts as true all factual allegations in Staunch's amended complaint and construes any well-pleaded factual allegations in her favor. *See Miller*, 50 F.3d at 377. Although Continental disputes Staunch's status as an "eligible employee"

and her eventual ability to prove a causal connection between her FMLA leave and Continental's termination of her employment, the Court need not accept as true Defendant's "bare assertion[s] of legal conclusions." *See Columbia Natural Res., Inc.*, 58 F.3d at 1109. This is particularly the case where, as here, Defendant filed its motion to dismiss before the parties' initial management conference or the close of preliminary discovery. *See Omnicare*, 2006 U.S. Dist. LEXIS 6497.

Thus, the Court denies Continental's motion to dismiss Staunch's "entire law suit" and, alternatively, her FMLA allegation for failing to state a claim upon which the Court can grant relief.

B. Plaintiff's Motion for Partial Summary Judgment on Her State Law Discrimination Claim

In cases of pregnancy discrimination alleged under Section 4112, Ohio courts apply the same burden-shifting approach used by federal courts. To establish such a claim, a plaintiff must demonstrate that she: (i) belonged to a protected class; (ii) suffered an adverse employment action; (iii) qualified for the position; and, (iv) was replaced by a person outside the protected class. *See EEOC v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831, 834 n.1 (6th Cir. 1997). *See also Tysinger v. Police Dep't of the City of Zanesville*, 463 F.3d 569, 573 (6th Cir. 2006).

Once a plaintiff establishes a *prima facie* case for pregnancy discrimination, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment

action. *Yenkin-Majestic Paint Corp.*, at 834. If the defendant sets forth a legitimate, non-discriminatory reason for the adverse employment action, the burden of production shifts back to the plaintiff to demonstrate that the reason was merely a pretext for discrimination. *Id.* Notwithstanding this burden shifting exercise, the plaintiff still shoulders the ultimate burden of proving her case. *Id.*

The plaintiff may show pretext either directly by persuading the factfinder that a discriminatory reason more likely motivated the employer, or indirectly by discrediting the employer's proffered explanation. *Id.* (internal quotation and citation omitted). To challenge the credibility of an employer's explanation, the plaintiff must demonstrate, by a preponderance of the evidence, that the proffered reason: (i) had no basis in fact; (ii) did not actually motivate the adverse employment action; or (iii) insufficiently motivated the adverse employment action. *Id.* (citation omitted).

Although Staunch meets the first three elements of a *prima facie* claim of pregnancy discrimination, she fails to establish the fourth element. The parties do not contest that, in early 2002, Staunch belonged to a FMLA-protected class, i.e., women seeking leave for pregnancy-related reasons. Also, Staunch had worked as a qualified flight attendant with Continental since 1998. Further, on April 29, 2004, Staunch suffered the adverse employment action of termination. Thus, Staunch meets the first three elements of *prima facie* pregnancy discrimination.

However, Staunch offers no evidence that Continental replaced her with "a person outside the

protected class." *Yenkin-Majestic Paint Corp.*, 112 F.3d at 834 n.1. Instead, Continental says that it treated Staunch equally or even more leniently than other flight attendants during her "Termination Warning." Staunch does not dispute Continental's claim. Without offering any evidence that Continental replaced her with similarly-situated, non-pregnant flight attendants or other evidence that Continental retaliated for her exercise of pregnancy leave two years before Staunch cannot state a *prima facie* case of pregnancy discrimination.

Even if Staunch could have established a *prima facie* case of discrimination, she does not convincingly show that her pregnancy-related leave in early 2002 provided the pretext for her employment termination on April 29, 2004. At the outset, the two events are temporally remote. *See, e.g.*, *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (noting that "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close"). *See also Hafford v. Seidner*, 183 F.3d 506, 515 (6th Cir. 1999) (finding that, absent additional evidence, two to five months between alleged discrimination and adverse employment outcome does not justify the creation of a triable issue of causation); *Cooper v. N. Olmstead*, 795 F.2d 1265, 1272 (6th Cir. 1986) (noting that four months is insufficient to support an inference of retaliation). Here, more than twenty-four months elapsed from the period of Staunch's protected FMLA leave in April 2002 and her April 29, 2004 firing. Thus,

Staunch fails to show the causal connection between her termination and her FMLAprotected activities.

Moreover, other facts negate any inference that could arise from the temporal proximity between Staunch's FMLA leave and her termination. In May 2003, Staunch recorded two "Sick Call After Assignment" incidents and four "Sick" incidents. Following this spate of absenteeism, Supervisor Piszczek issued to Staunch a "Termination Warning" that noted "[a]ny infraction in Job Performance or Dependability may lead to termination of employment." Nevertheless, Staunch recorded two "Sick" incidents in December 2003. Still, Continental did not fire her; instead, it chose to "informally counsel" Staunch in January 2004. Finally, after discovering that Staunch had flown for months with a noncompliant In-Flight Manual, Continental decided to fire her. This series of events does not evidence Continental's intent to fire Staunch in retaliation for her taking FMLA leave in April 2002.

Finally, Continental offers legitimate, nondiscriminatory reasons for Staunch's termination, i.e., deficient job performance and dependability violations, that Staunch does not show are pretextual. Staunch appended to her motion for partial summary judgment much of the same information relied upon by Continental, but she failed to refute it in any way. The Court finds the fact that both sides relied on the same evidence as an indicator of its validity. As a result, the Court accepts Continental's reasons for firing Staunch as factual, credible, and sufficient to motivate its decision to fire her.

Thus, the Court concludes that Staunch does not show her entitlement to a judgment establishing a *prima facie* case of pregnancy discrimination. Nor does Staunch show that her FMLA leave motivated Continental to fire her. Consequently, Staunch's motion for partial summary judgment fails.

C. Defendant's Motion for Summary Judgment on Plaintiff's "Entire Case"

1. The RLA Does Not Preempt Staunch's Federal and State Law Claims

In its motion for summary judgment, Continental repeats the primary assertion of its amended motion to dismiss: namely, that the RLA preempts the Court from considering Staunch's federal and state law claims. For the reasons presented above, Continental's "preemption" assertion against Staunch's "entire case" fails. However, as discussed below, Continental prevails in its motion for summary judgment because it successfully challenges the specific legal basis of each of Staunch's allegations against it.

2. Staunch's FMLA Claims Fail as a Matter of Law

Setting aside the parties' disagreement over whether Staunch qualified as an "eligible employee," the Court finds that Plaintiff's "interference" and "retaliation" claims have no basis in law. Contrary to the statute's requirements, *see* 29 U.S.C. § 2615(a)(1), Staunch offers no evidence that Continental interfered with, restrained, or denied her exercise of her FMLA rights during her pregnancy-related leave.

Further, in her response to Continental's motion for summary judgment, Staunch offers no new evidence to refute Defendant's assertion that her pregnancy-related absences from work in early 2002 contributed to Continental's April 29, 2004 termination of her employment. As discussed above, the events are too temporally remote to establish any relationship between her termination and her exercise of her FMLA rights. In addition, Staunch's continued excessive absenteeism and dependability violations supercede any pretextual connection between Staunch's FMLA leave and her termination.

Finally, Staunch does not refute Continental's assertion that her failure to include the December 10, 2003 Revision 23 in her in-flight manual triggered Defendant's decision to fire her. Based on these considerations, Staunch does not establish a *prima facie* case of "interference" or "retaliation" and her claims fail as a matter of law.

3. Staunch's Pregnancy Discrimination Claim Fails as a Matter of Law

Continental successfully challenges Staunch's pregnancy discrimination claim under Section 4112.02 of the Ohio Revised Code. As discussed above, Staunch does not establish a *prima facie* case of pregnancy discrimination. Viewing all evidence and drawing all reasonable inferences in favor of Continental, the non-moving party, *National Enterprises, Inc. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997), Staunch does not establish the requisite connection between her FMLA leave in 2002 and her April 29, 2004 termination. *Yenkin-Majestic Paint Corp.*, 112 F.3d at 834 n.1. As a

result, the Court finds Continental entitled to summary judgment as a matter of law on Staunch's claim of pregnancy discrimination under Section 4112.02(A) of the Ohio Revised Code.

4. Staunch's Public Policy Claim Fails as a Matter of Law

Finally, Staunch cannot maintain an Ohio "public policy" claim. Staunch asks the Court to find that Continental violated Ohio's public policy against pregnancy discrimination. Staunch bases her request on Continental's alleged violation of federal and state statutory law.

To establish a public policy wrongful termination claim, Staunch must show:

> 1. [t]hat a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element); 2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element); 3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element), and 4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

Collins v. Rizkana, 73 Ohio St. 3d 65, 69-70, 652 N.E. 2d 653 (1995).

A plaintiff may not make public policy wrongful termination claim if the underlying statute already contains a sufficient remedy for the firing. *Easer v. Curtis Indus., Inc.*, 774 F. Supp. 1076 (N.D. Ohio 1991); *Pozzobon v. Parts for Plastics, Inc.*, 770 F. Supp. 376 (N.D. Ohio 1991); *Provens v. Stark County Bd. of Mental Retardation and Developmental Disabilities*, 64 Ohio St. 3d 252, 594 N.E. 2d 959 (1992). Further, Ohio courts have held that "[a] claim for wrongful discharge in violation of public policy embodied in [a] statute prohibiting discriminatory practices will fail if the underlying discrimination claim fails." *Desanzo v. Titanium Metals Corp.*, 351 F. Supp.2d 769, 782-83 (S.D. Ohio 2005) (citations omitted).

The FMLA provides significant remedies, including back pay[1], front pay[2], compensation for benefits lost[3], liquidated damages[4], costs and attorney fees.[5] Likewise, Section 4112.99 of the Ohio Revised Code provides that "[w]hoever violates this chapter is subject to a civil action for damages, injunctive relief, and any other appropriate relief." OHIO REV. CODE ANN. § 4112.99. Given the availability of these statutory remedies, Staunch may not avail herself of

---

[1] 29 U.S.C. § 2617(a)(1)(A)(i)(I).

[2] 29 U.S.C. § 2617(a)(1)(B).

[3] 29 U.S.C. § 2617(a)(1)(A)(i)(II).

[4] 29 U.S.C. § 2617(a)(1)(A)(iii).

[5] 29 U.S.C. § 2617(a)(3).

Ohio's public policy claim for pregnancy discrimination under the common law.

Even if she could plead such a claim, Staunch shows insufficient evidence to make out a public policy claim. Staunch must show her exercise of her FMLA rights motivated Continental to fire her. As discussed above, Staunch fails to show this causal connection. Most tellingly, Continental fired Staunch two years after her FMLA leave. Further, Continental held-off firing her until April 29, 2004, although it had grounds to terminate her employment in December 2003. Additionally, Staunch fails to show circumstantial evidence sufficient to support a finding that Continental fired her in retaliation for her use of FMLA. Staunch does not offer evidence that Continental fired similarly-situated employees who did not seek or use FMLA leave. Staunch produces evidence that Continental did not terminate some employees who had failed to update their In-Flight Manuals; but, she offers no evidence that Continental maintained the employment of other flight attendants on "Termination Warning" who, like her, failed to update their In-Flight Manuals. In short, the "comparators" highlighted in Staunch's pleadings do not share situations similar to hers.

Thus, allowing Staunch's "public policy" claim does not vindicate the goals of either the FMLA or the Ohio Revised Code. Also, Staunch does not give sufficient evidence that her use of FMLA leave motivated Continental to fire her. Therefore, the Court finds Continental entitled to summary judgment on Staunch's claim for wrongful termination under Ohio's common law.

IV. Conclusion

For these reasons, the Court **DENIES** Continental's amended motion to dismiss, **DENIES** Staunch's motion for partial summary judgment, **GRANTS** Continental's motion for summary judgment, and **DISMISSES** Staunch's claims against Continental. Further, as a result of this Opinion and Order, Continental's original motion to dismiss is **MOOT**.

IT IS SO ORDERED.

Dated: January 26, 2007

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 1:06-CV-1011

[Filed January 26, 2007]

HOLLY L. STAUNCH,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CONTINENTAL AIRLINES, INC.,	)
	)
Defendant.	)
	)

JUDGMENT
[Resolving Docs. No. 6, 21, 34, 39]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Before the Court is Defendant Continental Airline, Inc.'s amended motion to dismiss, Doc. 21, and motion for summary judgment, Doc. 34, as well as Plaintiff Holly L. Staunch's motion for partial summary judgment, Doc. 39.

For the reasons discussed in the accompanying Opinion and Order, the Court **DENIES** Continental's amended motion to dismiss, **DENIES** Staunch's motion for partial summary judgment, **GRANTS**

Continental's motion for summary judgment, and **DISMISSES** Staunch's claims against Continental.

As a result of the accompanying Opinion and Order, Continental's original motion to dismiss, Doc. 6, is **MOOT**.

Accordingly, this action is terminated pursuant to Fed. R. Civ. P. 58.

IT IS SO ORDERED.

Dated: January 26, 2007

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-3315

[Filed April 11, 2008]

HOLLY L. STAUNCH,
Plaintiff-Appellant,

v.

CONTINENTAL AIRLINES, INC.,
Defendant-Appellee.

ORDER

BEFORE: KENNEDY, MARTIN, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk//s/

APPENDIX D

United States Code Annotated
Title 29. Labor
Chapter 28. Family and Medical Leave
Subchapter I. General Requirements for Leave

29 U.S.C. § 2611. Definitions

As used in this subchapter:

(1) Commerce

The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 142 of this title.

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed--

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include--

(i) any Federal officer or employee covered under subchapter V of chapter 63 of Title 5; or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

(3) Employ; employee; State

The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title.

(4) Employer

(A) In general

The term "employer"--

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes--

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the Government Accountability Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment benefits

The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 1002(3) of this title.

(6) Health care provider

The term "health care provider" means--

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent

The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person

The term "person" has the same meaning given such term in section 203(a) of this title.

(9) Reduced leave schedule

The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) Secretary

The term "Secretary" means the Secretary of Labor.

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves--

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter

The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is--

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse

The term "spouse" means a husband or wife, as the case may be.

(14) Active duty

The term "active duty" means duty under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of Title 10.

(15) Contingency operation

The term "contingency operation" has the same meaning given such term in section 101(a)(13) of Title 10.

(16) Covered servicemember

The term "covered servicemember" means a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.

(17) Outpatient status

The term "outpatient status", with respect to a covered servicemember, means the status of a member of the Armed Forces assigned to--

(A) a military medical treatment facility as an outpatient; or

(B) a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(18) Next of kin

The term "next of kin", used with respect to an individual, means the nearest blood relative of that individual.

(19) Serious injury or illness

The term "serious injury or illness", in the case of a member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter V. Wage and Hour Division, Department of Labor
Subchapter C. Other Laws
Part 825. The Family and Medical Leave Act of 1993
Subpart A. What is the Family and Medical Leave Act, and to Whom Does It Apply?

29 C.F.R. § 825.110 Which employees are "eligible" to take leave under FMLA?

(a) An "eligible employee" is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (See § 825.105(a) regarding employees who work outside the U.S.)

(b) The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer

(e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as "at least 12 months," 52 weeks is deemed to be equal to 12 months.

(c) Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (see 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used. In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (e.g., bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee is deemed to have met this test. See also § 825.500(f). For this purpose, full-time teachers (see § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employer must be able to

clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave.

(d) The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (i.e., two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee

that the employee is not eligible within two business days of receiving the employee's notice.

(e) The period prior to the FMLA's effective date must be considered in determining employee's eligibility.

(f) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

Subpart E. What Records Must Be Kept to Comply with the FMLA?

29 C.F.R. § 825.500 What records must an employer keep to comply with the FMLA?

(a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the

recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund or program to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of the FMLA exists or the DOL is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.

(b) Form of records. No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.

(c) Items required. Covered employers who have eligible employees must maintain records that must disclose the following:

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA eligible employees (e.g., available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all general and specific written notices given to employees as required under FMLA and these regulations (see § 825.301(b)). Copies may be maintained in employee personnel files.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of

leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

(d) Covered employers with no eligible employees must maintain the records set forth in paragraph (c)(1) above.

(e) Covered employers in a joint employment situation (see § 825.106) must keep all the records required by paragraph (c) of this section with respect to any primary employees, and must keep the records required by paragraph (c)(1) with respect to any secondary employees.

(f) If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (i.e., not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

(2) with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with paragraph (b) of this section.

(g) Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (see 29 CFR § 1630.14(c)(1)), except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

(Approved by the Office of Management and Budget under control number 1215- 0181)

[60 FR 16383, March 30, 1995]

Fed. R. Civ. P. 56

Rule 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

(1) 20 days have passed from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(b) By a Defending Party. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) ***Establishing Facts.*** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material

facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts--including items of damages or other relief--are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) ***Establishing Liability.*** An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) ***In General.*** A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) ***Opposing Party's Obligation to Respond.*** When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary

judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CASE NO. 06 CV 1011

[Filed December 18, 2006]

HOLLY L. STAUNCH	)
	)
Plaintiff	)
	)
vs.	)
	)
CONTINENTAL AIRLINES, INC.	)
	)
Defendant	)
	)

JUDGE JAMES GWIN

[MOTION FOR SUMMARY JUDGMENT FILED BY CONTINENTAL AIRLINES, INC. EXHIBIT C, IN PART]

VERIFIED STATEMENT OF MARY STURCHIO

I, Mary Sturchio, hereby verify and state as follows:

1. I have personal knowledge of the statements made in this Verified Statement submitted in support of Defendant's motion for summary judgment. This information is based upon my personal knowledge and certain business records of Continental Airlines, Inc. ("Continental"), which are attached to this Verified Statement.

2. Continental employs me as the Manager of Human Resources for the Inflight Services division, Newark and Cleveland bases. I have been in this position since July 2000 and have worked for Continental since August 1997.

3. Based upon Continental records and as explained in this verification, I calculate that Holly Staunch's flight time, check-in time, ground time, de-brief time, and training time, in the period from January 2001, through January 22, 2002, total 1205 hours and 52 minutes. **Attachment A** contains a chart summarizing these calculations. Deducting flight and ground time from January 1, 2001, through January 20, 2001, I calculate that Holly Staunch's flight time, check-in time, ground time, de-brief time, and training from January 21, 2001, through January 22, 2002, total 1127 hours and 41 minutes. See **Attachment A**.

4. **Flight time:** I relied upon flight attendant pay registers for the applicable months to calculate the flight hours Ms. Staunch worked. Copies of Ms. Staunch's flight attendant pay registers for the months of January 2001 through January 2002 are attached as **Attachment B**. The flight hours per day for each trip are recorded in the column entitled "Pay Time" on these pay registers.

5. **Check-In:** I relied on these pay registers and the contractual provisions contained in the collective bargaining agreement in effect in 2001 and 2002 to calculate the hours Ms. Staunch spent performing check-in activities in connection with the flights she worked during that same time period. Copies of the contractual provisions from the April 1, 2000, through October 1, 2004 Agreement between Continental Airlines, Inc. and International Association of Machinists and Aerospace Workers (CBA) are attached to this verification as **Attachment C**. Under these provisions, flight attendants must check-in for flights on aircrafts with more than 160 customer seats one hour and 15 minutes before the scheduled flight time if the flight departs from the flight attendant's base (here, Cleveland, which is designated "CLE" on the flight attendant pay registers) and one hour before flight time at all layover points. For flight on aircrafts with 160 or fewer customer seats, a flight attendant must report for check in one hour before the flight if the flight departs from the flight attendant's base and 45 minutes before the flight at all layover points. A flight attendant on a deadheading flight must report 45 minutes before the flight leaves from any departure location and on any type of aircraft. *See* CBA Page 5-3. **Attachment C**.

6. In order to determine the appropriate check-in time for each flight, I first determined the type of aircraft Ms. Staunch worked in each pairing by reading the flight attendant pay registers. The pairing numbers are listed by date of the flight on the line reading "PS," which stands for "Pairing Summary." The first number in each pairing indicates the aircraft type. A designation of "2" stands for a 777 aircraft, "3"

is a 757 aircraft, "4" is a 767-400 aircraft, and "5" is a 737 aircraft. Ms. Staunch always worked on a 737 aircraft. The 737 has fewer than 160 customer seats.

7. **Debrief Time:** Under the applicable contractual provision, a flight attendant is expected to remain on a flight on which she is a working crew member for 15 minutes after the flight blocks in or, if Customs clearance is required for the flight, 30 minutes after the flight blocks. *See* CBA page 5-5. **Attachment C**. I included the applicable hours for this "debrief time" in calculating Ms. Staunch's hours worked for purposes of this verification.

8. **Ground Time:** Although not compensable time under the CBA, I also have included ground time for the flights flown by Ms. Staunch. Ground time is the time between flight legs when attendants are not necessarily on the plane (after debrief and before check-in), but remain on duty. I included in my calculations the ground time between the flights flown by Ms. Staunch between January 1, 2001, and January 22, 2002.

9. **Training Time:** The CBA provides that flight attendants will be paid 4:15 minutes per day of initial new equipment training or recurrent training. *See* CBA page 6-2. **Attachment C**. During the period from January 2001 through December 2001, Ms. Staunch attended training on two days, April 22 and April 23, 2001. *See* April 2001 flight attendant pay register. **Attachment B**. I included 4:15 for each of these days of training as hours worked. **Attachment A**. Ms. Staunch did not attend any training in January 2002. **Attachment B**.

10. Section 14 of the CBA explains what maternity leave is given to flight attendants. *See* CBA pages 14-1 through 14-10. **Attachment C**. Maternity and pregnancy-related conditions are treated like any other disability under the CBA. *See* CBA page 14-5. **Attachment C**. A flight attendant may continue to fly through the end of her 27th week of pregnancy provided she is fit to perform her duties. Starting the 28th week, she will be placed on a maternity leave of absence. *See* CBA page 14-5. **Attachment C**. At the time of the birth of the baby, the flight attendant may, at her option, elect on a one-time basis to extend the maternity leave up to twelve (12) months following her pregnancy. A flight attendant on a maternity leave of absence will be eligible for sick leave benefits until eight weeks following the date of delivery with verification from her doctor that she is unable to fly. *See* CBA page 14-5. **Attachment C**.

11. Pursuant to 28 U.S.C. § 1746, I verify under penalty of perjury that I have read the foregoing Verified Statement and it is true and correct.

Executed this 14 day of December, 2006.

/s/
Mary Sturchio

/s/
[NOTARY PUBLIC]

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CASE NO. 06 CV 1011

[Filed January 8, 2007]

HOLLY L. STAUNCH	)
	)
Plaintiff	)
	)
vs.	)
	)
CONTINENTAL AIRLINES, INC.	)
	)
Defendant	)
	)

JUDGE JAMES GWIN

[ATTACHMENT TO MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT]

AFFIDAVIT OF HOLLY L. STAUNCH

STATE OF OHIO	)
	) SS:
MAHONING COUNTY	)

Holly L. Staunch, being first duly sworn according to law, deposes and says that the following is true to her personal knowledge:

1. Affiant is the Plaintiff in the above captioned matter.

2. In early January 2002, I began having complications from my pregnancy such as placenta previa and extreme nausea. Placenta previa is a misplaced or low lying placenta. I was classified as having a high risk pregnancy.

3. I was under continuing doctor's care for my serious health condition related to my pregnancy.

4. I requested intermittent family medical leave from defendant based upon my own serious health condition, which was related to my pregnancy.

5. During the twelve months preceding my request for an intermittent Family Medical Leave of Absence from my employer, Continental Airlines, Inc., in January 2002, I performed at least 2,175 hours of work for the benefit of my employer Continental Airlines, Inc.

6. Attached hereto as Exhibit J is a compilation made upon personal knowledge indicating the time I recollect working for Continental in 2001.

7. At the time I made the compilation, I did not have Continental records reflecting my flight

hours. From the records attached to Defendant's motion for summary judgment, I learned that I underestimated the amount of flight hours worked. In fact, Continental's records reflect I had 948 hours and 52 minutes of flight time rather than the 800 hours I previously recalled. Thus, I would upwardly adjust my hours worked in the twelve months preceding my request for leave to 2,323 hours and 52 minutes.

8. Continental's submission based upon the affidavit of Mary Sturchio does not reflect the actual hours I worked for Continental. For example, the Sturchio submission listed release time as 15 minutes for each duty day worked. In fact, work was performed after each flight segment and 15 minutes was not sufficient to perform the duties required.

9. Sturchio's submission listed forty five minutes for report time for a remain overnight layover, when in fact, I had to report at least one hour before the start of each day.

10. Sturchio's affidavit does not accurately reflect the time spent in recurrent training and in preparation for recurrent training.

11. Sturchio's affidavit does not include time for required computer work, manual revisions, review of briefing books, meetings with supervisors, time for making required liquor deposits as lead flight attendant, time going

through customs or travel time spent on behalf of the employer.

12. Pursuant to Continental Airlines regulations, flight attendants were not permitted read while on board the aircraft.

13. In May of 2003, I had a sick call from May 6, 2003 to May 12, 2003. The entire sick call was for a single reason. I was requested by Continental to bring in a medical excuse for that illness and I did so.

14. But for inclusion of sick calls that I had previously been told were excused based upon the approval of my request for intermittent family medical leave in 2002, my absence in May of 2003 would not have warranted a termination warning under Continental's attendance policies.

Further affiant sayeth naught.

/s/ _____
HOLLY L. STAUNCH

Sworn to before me and signed in my presence this 8th day of January, 2007.

/s/ _____
NOTARY PUBLIC

[SEAL]

* * *

PLAINTIFF'S EXHIBIT J

—	Flight hours – paid in 2001	800
—	Computer work: bidding monthly, schedule adjustments, checking pax loads, a/c changes, checking for messages or sched. changes	50
—	Reviewing & inserting manual revisions	5
—	Annual recurrent training: classroom, workbook & prep	20
—	Reviewing "Briefing Book"	18
—	Reading/reviewing Monthly Operational Update newsletter (MOU)	12
—	Mandatory meetings w/ Supervisor	5
—	Unannounced manual/uniform/duty items checks	5
—	Customs/Immigration processing in Canada, Mexico, Caribbean	5
—	Checking & reading/reviewing contents of V-file before/afer every trip	20
—	Check in time (not included in flight time hours "a minimum of 1 hour prior to the first departure time at the start of every duty day	250

— Annual open enrollment (Benefits) 5

— Add'l preflight ✓, crew briefings, expanded aircraft security ✓ 25

— FLSA termed "Travel Time" – time spent (during regular working hours) on long layovers, where otherwise emp. Could be working/flying 50

— Crew Van – time spent waiting for or riding in van/limo to & from hotels, where company policies still exist (i.e. in uniform, I.D. badge ✓, no alcohol consump. . . .) 125

— Aircraft changes – waiting for inbound a/c to arrive & deplane 20

— Thru flights – " F/A must remain onboard the a/c with thru pax (not incl. in flight time) 10

— Irregular Operations – under 1 hour (w/ aircraft door open & pax onboard) Weather delays, gate holds, mechanicals, waiting for inboard connecting pax, ATC delays 50

— Boarding time – 30-40 mins. prior to each flight performing boarding duties 350

—	Release time (not inclu. in flight pay)	
	– Assisting w/ deplaning, wheelchairs, unaccompanied minors (UNAM's), greeting, checking bins & seats for suspicious bags left behind . . .	170
—	Mandatory liquor deposits (MLDE) at end of every duty day as LFA	30
—	"Sit time" during regular ops	
	– time w/in a pairing that F/A waits for next flight (built into "duty" day) while still "on duty"	150
	TOTAL HOURS – 2001 =	**2175 HRS.**

03

(3)

No. 08-53

FILED
AUG 13 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

HOLLY STAUNCH,

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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August 13, 2008

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QUESTION PRESENTED

Did the Sixth Circuit Court of Appeals correctly apply 29 C.F.R. §821.110(c) in determining based upon the detailed record before it that Respondent Continental Airlines sustained its burden of proof to establish that Petitioner Staunch was not an eligible employee under the Family and Medical Leave Act; and that the Petitioner's vague and generalized, self-serving affidavit was insufficient to rebut Respondent's specific evidence or to create a genuine issue of material fact under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Continental Airlines, Inc. ("Continental") has no parent corporation. As a consolidated group, the following publicly-held companies own 10% or more of the stock of Continental: AXA Assurances I.A.R.D. Mutuelle; AXA Assurances Vie Mutuelle; AXA Courtage Assurance Mutuelle; AXA; and AXA Financial, Inc. No other publicly held corporation owns 10% or more of Continental's stock.

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COUNTERSTATEMENT OF THE CASE

On April 25, 2006, Petitioner Holly Staunch ("Staunch") initiated this lawsuit against Respondent Continental Airlines, Inc. ("Continental") claiming that: (1) Continental interfered with her right to take time off under the Family and Medical Leave Act ("FMLA"); (2) Continental terminated Staunch in retaliation for Petitioner's pregnancy-related leave two years earlier; (3) Continental discriminated against Staunch on the basis of her pregnancy; and (4) Staunch's termination was in contravention of Ohio's public policy against pregnancy discrimination. (*R.1, Complaint, Jt. Appx. pp. 8-13*).[1]

On December 18, 2006, the parties filed cross-motions for summary judgment. (*R.34, Continental's Motion for Summary Judgment, Jt. Appx. pp. 182-83*; *R.43, Continental's Amended Memorandum in Support of its Motion, Jt. Appx. pp. 613-44*; *R.39, Staunch's Motion for Summary Judgment, Jt. Appx. pp. 489-90*). On January 26, 2007, the Northern District of Ohio denied Staunch's motion for summary judgment and granted Continental's motion for summary judgment on all of Staunch's claims. *Staunch v. Continental Airlines*, 2007 WL 218729 (N.D. Ohio) (*Petitioner's Appx. pp. 19a-43a, R.50, Memorandum of Opinion and Order, Jt. Appx. pp. 853-69*).

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[1] Citations to "*R.__*" refer to the docket number recorded by the District court. References to pages of the Joint Appendix are cited as "*Jt. Appx. p. ___*."

The district court determined that Staunch had not proved the elements of her interference and retaliation claims against Continental and that Continental demonstrated legitimate, nondiscriminatory reasons for Staunch's termination, i.e. deficient job performance and dependability violations. Finding that "Staunch offered no evidence that Continental interfered with, restrained, or denied her exercise of her FMLA rights during her pregnancy related leave," the court granted summary judgment on all claims. *Staunch v. Continental Airlines, Inc.*, 2007 WL 218729 (N.D. Ohio) at *8, 12 Wage & Hour Cas. 2d (BNA) (*Petitioner's Appx. pp. 35a-37a*).

Staunch appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed summary judgment in favor of Continental. *Staunch v. Continental Airlines, Inc.*, 511 F.3d 625 (6th Cir. 2008) (*Petitioner's Appx. pp. 1a-18a*). The Court of Appeals ruled on the alternative basis presented by Continental both in the district court and before the Court of Appeals that Staunch was not an eligible employee because she had not met the requisite threshold of having worked 1250 hours in the twelve-month period preceding her pregnancy leave. *Staunch v. Continental Airlines, Inc.*, 511 F.3d 625, 630-31 (6th Cir. 2007) (*Petitioner's Appx. pp. 8a-12a*). Staunch filed a Petition for *Rehearing En Banc* before the Sixth Circuit Court of Appeals. Pursuant to Federal Rule of Appellate Procedure 35(e), the Court of Appeals did not request Continental to file a responsive brief in opposition, and on April 11, 2008, declined to further

review the case. (*Respondent's Appx. pp. 38-39 docket entries of Sixth Circuit Court of Appeals* and *Petitioner's Appx. pp. 44a-45a*).

On July 9, 2008, Staunch filed a petition for a writ of certiorari in this Court limited to the sole technical issue of whether the Court of Appeals properly decided that Staunch was ineligible for FMLA coverage because she failed to produce sufficient evidence to defeat Continental's evidentiary submission in support of its motion for summary judgment showing that Staunch worked less than 1250 hours in the twelve months preceding her leave. Staunch does not discuss, in her petition, the various other substantive grounds relied upon by the district court in granting summary judgment.

STATEMENT OF THE FACTS

Staunch began working as a flight attendant for Continental on May 28, 1998. (*R.34, Staunch Tr. 41, 52, Jt. Appx. pp. 219-20*). During her tenure with Continental, Staunch was a member of the International Association of Machinists and Aerospace Workers ("IAM" or "the Union"), and the terms and conditions of her employment were dictated by a collective bargaining agreement ("CBA") between the Union and Continental (*Id. at 85, Ex.9, Jt. Appx. pp. 228, 299-305*).

Between January 21, 2002, and the end of April 2002, Staunch requested and was permitted to take

leave pursuant to her CBA on an intermittent basis due to her pregnancy, until she began a contractually-provided maternity leave of absence on May 1, 2002. (*R.35, DeVito Aff. ¶15, Jt. Appx. p. 408*; *R.34, Staunch Tr. 197, Exs.25, 38, Jt. Appx. pp. 238, 321-23, 330*). Staunch remained out on a combination of maternity and other company-offered leaves of absence from May 1, 2002, until the end of January 2003. (*R.34, Staunch Tr. 202, Jt. Appx. p. 239*).

Because of a violation while already on a termination warning level of progressive discipline, Staunch was discharged on April 29, 2004. (*Id. at 286, Ex.53, Jt. Appx. pp. 253, 376-77*).[2] Staunch grieved her discharge and it was denied. (*Id. at 295-98, Ex.54, Jt. Appx. pp. 256, 378*). Staunch then advanced her case to

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[2] On April 22, 2004, it was discovered that Staunch had flown over the course of almost five months without a compliant safety manual. (*R.34, Staunch Tr. 269, 316, Ex 49, Jt. Appx. pp. 364-68.*) Specifically, she had failed to update her manual with Revision 23, issued December 10, 2003, dealing with safety measures involving smoke in an aircraft cabin. (*Id. at 272-74, Ex.50, Jt. Appx. pp. 250, 359-71.*) From the time Revision 23 had been issued, Staunch had flown with a non-compliant manual on December 14, 15, 20 and 21; January 11; February 8; and March 21 and 28. (*Id. at Ex.49, Jt. Appx. pp. 364-68.*) Staunch understood that flying without a compliant manual was both dangerous and prohibited. (*Id. at 273-74, 290, Jt. Appx. pp. 250, 254.*) She also understood that it was her responsibility to ensure she flew with a compliant manual. (*Id. at 318, Jt. Appx. p. 258.*) Nonetheless, she managed to check into the airport operations office, bypass at least four Inflight Weekly Briefings alerting flight attendants to the existence of Revision 23, and fly on several occasions without making her manual compliant. (*Id. at 282, Ex.52, Jt. Appx. pp. 252, 372-75.*)

arbitration before the System Board of Adjustment. (*Id. at 347, Ex.63, Jt. Appx. pp. 264, 390-98*). The Adjustment Board also upheld Staunch's discharge. (*Id*).

Continental's records established that between January 20, 2001, and January 21, 2002, the twelve-month period preceding Staunch's requested FMLA leave, Staunch worked less than 1,130 hours. (*Respondent's Appx. pp. 7-11, Sturchio Aff. at ¶3, Jt. Appx. pp. 410-11*). The hours worked were established by compiling the flight attendant pay registers detailing each flight Staunch worked and by adding time required by the CBA for check-in and de-briefing, as well as training time and ground time. (*Respondent's Appx. pp. 7-11, id. at ¶¶3-9, Jt. Appx. pp. 410-13*). The records showed, and Staunch admitted, that she was compensated for all work for which she was entitled to be paid. (*Respondent's Appx. pp. 7-11, id. at Ex.B to Sturchio Aff., Jt. Appx. pp. 421-34*; *R.34, Staunch Tr. 94, Jt. Appx. p. 230*).

The only evidence Staunch offered to rebut Continental's detailed, verified records were limited to her own non-specific, general descriptions and estimations of her alleged additional hours worked that were not reflected in Continental's records or any other records for that matter. Staunch admitted that the handwritten, undated and untitled list of tasks and hours contained in Exhibit 76 (*R.41, Ex.J to Staunch Affidavit, Jt. Appx. pp. 666-68*) is based solely on estimations made from her memory in response to Defendant's discovery requests. (*R.47, Reply Brief, Ex.B*; *Staunch Tr. 392, 397, 400, 409, 413-14, 418, Jt.*

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Appx. pp. 763-64, 766-68). The contents of this document were not recorded contemporaneously with the alleged performance of the hours and tasks described therein, nor were they based on specific time records of any kind. (*Id.*)

Additionally, when viewed in light of the record evidence, Staunch's allegations regarding additional hours worked by her were disingenuous. The applicable CBA dictates that flight attendants must check in anywhere from 45 minutes to 1 hour, 15 minutes pre-take off for check-in time depending upon the size of the plane to which they are assigned. (*Respondent's Appx. pp. 8-9, R.36, Sturchio Aff. ¶¶5-6 and attachments thereto, Jt. Appx. pp. 411-12, 439*). Continental credited Staunch 45 minutes to one hour of check-in time for each of the approximately 140 flights she worked during the relevant time period. (*Id.*) This evidence notwithstanding, Staunch insisted in documents that were filed with the district court that she was entitled to an additional 250 hours "check in time (not included in flight time hours) 'a minimum of 1 hour prior to the first departure time at the start of every duty day.'" (*Petitioner's Appx. p. 73a, R.46, Ex.J to 1/8/07 Staunch Aff., Jt. Appx. p. 666*). However, in accordance with the CBA, that time was already included by Continental in the calculation of hours worked by Staunch.

Staunch also demanded an additional five hours' credit for "customs/immigration processing in Canada, Mexico, Caribbean." (*Petitioner's Appx. p. 73a, id. at Ex.J, Jt. Appx. p. 666*). However, Continental's records showed that, during the relevant time period,

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Staunch made only two trips to Canada and no trips to Mexico or the Caribbean. (*R.36, 2001 Flight Hours attached to Sturchio Aff. at 7/14/01, 7/15/01, 11/7/01, 11/8/01, Jt. Appx. pp. 416-20*). Besides, any time that Staunch spent in customs is covered by the check-in time calculation discussed above and included in Continental's calculation of hours worked.

Pursuant to the collective bargaining agreement, Continental credited 8 hours and 30 minutes "hours worked" for the two 4 hour and 15 minute training sessions that Staunch attended in 2001. (*Respondent's Appx. p. 10, R.36, Sturchio Aff. ¶9, Jt. Appx. p. 413*). However, Staunch maintained before the District court that she was entitled to 20 hours for "annual recurrent training: classroom, workbook and prep" – a calculation at which she arrived from only her "memory." (*Petitioner's Appx. p. 73a, R.46, Ex.J to 1/8/07 Staunch Aff., Jt. Appx. p. 666*; *R.47, Ex.B*; *Staunch Tr. 408-09, Jt. Appx. pp. 765-66*). Apparently, Staunch wanted the District court to give her three times the credit for the two training sessions that she actually attended.

Thus, Staunch presented no specific credible evidence that she worked more hours than set forth in Continental's computation. She also presented no evidence that Continental's records were inaccurate. Staunch's sole argument before the District court in support of her contention that Continental's records were not accurate was based on the fact that, under the CBA, Continental does not pay flight attendants for all hours that might arguably be considered

the Fair Labor Standards Act
Opposition Brief p. 4, Jt
d this co 8

"hours worked" under the Fair Labor Standards Act ("FLSA"). (*R.46, Plaintiff's Opposition Brief p. 4, Jt. Appx. p. 648*).[3] Staunch based this conclusion on a total mischaracterization of Inflight Director Janie DeVito's deposition testimony – DeVito never testified about what goes into the calculation of *hours worked*. (*Compare Id. at p. 4, Jt. Appx. p. 648,* and *R.42, DeVito Tr. 83-94, Jt. Appx. pp. 605-08*). DeVito only testified about which flight attendant job functions are compensable pursuant to the terms of the CBA and how flight attendants are compensated for those tasks. (*Id.*)

Consequently, Staunch's observation did not demonstrate that Continental's records, attached to the affidavit of Mary Sturchio and summarized therein, were not accurate on the issue of how many hours Staunch worked during the relevant time period because Sturchio's conclusions were not based solely on hours paid. (*Respondent's Appx. pp. 7-11, R.36, Sturchio Aff. ¶8, Jt. Appx. p. 412*). To the contrary, Sturchio's conclusion regarding the hours worked by Staunch during the relevant time period pursuant to Continental's records was based on all of Staunch's "hours worked," including those for which she was not paid under the CBA. (*Respondent's Appx. pp. 7-11, id. at ¶¶4-9, Jt. App. pp. 411-13*).

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[3] The CBA is relevant to determine whether time worked by Staunch is properly deemed "time worked" under the FLSA. *Knapp v. America West Airlines*, 207 Fed. Appx. 896, 12 Wage and Hour Cas. 2d 6 (10th Cir. 2006).

Because there was no evidence in the record to

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Because there was no evidence in the record to show, by a just and reasonable inference, that Staunch worked more hours in addition to those reflected in Continental's records, Continental's evidence showing that Staunch worked less than 1,130 hours during the relevant time period was unrefuted.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS CASE DOES NOT WARRANT REVIEW UNDER THE STANDARDS OF SUPREME COURT RULE 10(c).

Supreme Court Rule 10(c) provides in pertinent part as follows: "A petition for a writ of certiorari is rarely granted when the asserted error consists of factual findings or the misapplication of a properly stated rule of law." The Court has long held: "We do not grant a certiorari to review evidence and discuss specific facts." *See U.S. v. Johnston*, 268 U.S. 220, 227 (1925).

Contrary to those principles, Staunch asks this Court to review detailed specific factual findings on the computation of Staunch's lack of necessary work hours to establish eligibility under the FMLA. She asks this Court to engulf itself in reviewing detailed affidavits and exhibits for evidentiary analysis. It is not the role of this Court to engage in such fact finding and evidentiary analysis.

Moreover, Staunch ignores the properly stated

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Moreover, Staunch ignores the properly stated rule of law which is the focal point of the decision of the Court of Appeals – 29 C.F.R. §825.110(c). This regulation provides that where an employer does not "maintain" a record of the actual hours spent performing duties, the employer has the burden to prove that the employee did not work the requisite 1250 hours. The Court of Appeals applied that correct legal standard and held that "Continental has clearly demonstrated that Staunch did not work 1250 hours in the twelve months preceding her request for leave." *Continental*, 511 F.3d at 630 (*Petitioner's Appx. p. 11a*). This case involves the application of a properly stated rule of law, and Staunch's failure to refute evidence under that properly stated standard.

II. STAUNCH WAIVED HER ARGUMENTS BY NOT PRESENTING THEM TO THE SIXTH CIRCUIT PANEL

Before this Court, Staunch primarily argues that she is entitled to a relaxed standard for presenting evidence of her hours worked. Without citations to any Supreme Court or Circuit Court authority, she also briefly contends that she is presumed eligible under the notification requirements of 29 C.F.R. §825.110(d), and that she is presumed eligible as an exempt employee pursuant to 29 C.F.R. §825.500(f)(1). However, Staunch did not present any of these arguments to the Sixth Circuit Panel which heard the case. (*See Respondent's Appx. pp. 17-37, Excerpts from Final Brief of Appellant and Final Reply Brief of*

Appellant where there was no discussion on any of

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Appellant where there was no discussion on any of these points).[4]

With respect to her argument on summary judgment standards, Staunch simply argued that there was an alleged conflict between the affidavits. She did not suggest that she was entitled to a relaxed standard allowing her to speculate on hours worked based solely upon her "recollection." She did not raise the notification argument for eligibility and the presumption of eligibility argument for exempt employees at all. (*Respondent's Appx. pp. 17-37*).

Accordingly, Staunch has waived these arguments. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976). Moreover, the Court also need not address arguments, even when raised, which were not decided. *See Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005), holding that "[t]he Court is a court of review, not first view." *See also Supreme Court Practice*, pp. 464-65 (Eugene Gressman, et al., editors, BNA Books, 9th Ed. 2007).

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[4] Staunch did not raise these arguments before the Sixth Circuit Panel. Instead she raised them for the first time in *Petition for Rehearing En Banc*. By not timely raising these issues, she deprived the panel of the opportunity to review those issues in the original briefing.

III. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER CIRCUIT.

As an initial matter, the Court should not grant certiorari because the question of whether Staunch is an "eligible employee" under the FMLA is totally irrelevant to the case's ultimate outcome, given that the district court concluded that *all of her FMLA claims failed on the merits as a matter of law*. *Continental*, 2007 WL 218729 at * 8-9. (*Petitioner's Appx. pp. 36a-37a*). The Sixth Circuit correctly applied the controlling law, 29 C.F.R. §825.110(c), to the particular facts of Staunch's case and concluded that she is not entitled to take her case to a jury in the face of Continental's accurate, verified records. *Continental*, 511 F.3d at 630-31. (*Petitioner's Appx. p. 12a*). Only three circuit courts have addressed the burden of proof set forth in §825.110(c) in this context and they all agree that unsubstantiated testimony from the plaintiff cannot defeat a properly supported motion for summary judgment. Moreover, the Sixth Circuit's decision in this case is in keeping with Supreme Court precedent.

An FMLA claim cannot be maintained by a plaintiff who was not an "eligible employee." *Humenny v. Genex Corp., Inc.*, 390 F.3d 901, 906 (6th Cir. 2004). To be an "eligible employee," one must work at least 1250 hours during the twelve-month period prior to the commencement of the leave under

review. Section 825.110(c) of Title 29 of the Code of Federal Regulations provides:

> "In the event an employer does not maintain an accurate record of hours worked by an employee, . . . the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee is deemed to have met this test." (*Respondent's Appx. pp. 1-2*).

The Sixth Circuit decided that Staunch was not an "eligible employee" under the FMLA based on its correct application of §825.110(c) to the particular facts of this case.[5] Specifically, to meet its burden of proof, Continental submitted a verified statement from Mary Sturchio, the Manager of Human Resources for its Inflight Services Division in Newark and Cleveland. This verified statement was supported by three exhibits: a five-page chart of Staunch's flight hours, including dates and times spent by Staunch performing each of her job duties; thirteen pages of flight attendant pay records with data on all of Staunch's work-related activities; and relevant sections of the CBA between Continental and Staunch's union defining different categories of

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[5] Staunch's brief does not analyze the standards of proof controlling this case pursuant to 29 C.F.R. §825.110(c). Indeed, Staunch cites the regulation just once and entirely ignores the portion of the regulation dealing with the employer's burden to prove that the employee did not work 1250 hours.

time worked by flight attendants. The verified statement explained the basis for each and every determination that yielded Sturchio's ultimate conclusion that Staunch worked less than 1,130 hours during the relevant time period. (*Respondent's Appx. pp. 7-11*).

In response, Staunch provided an affidavit from herself and an undated, generalized list of tasks and hours that she compiled based solely on her own personal recollection. She never presented any evidence to prove that she performed these alleged uncompensated tasks on specific days, nor did she present any evidence to refute Continental's records and analysis proving that she had not worked the requisite 1250 hours. *Continental*, 511 F.3d at 630 (*Petitioner's Appx. p. 11a*). Staunch now asks this Court to revisit the Circuit Court's findings regarding the sufficiency of her evidence. The question of Staunch's FMLA eligibility is a routine foundational question ordinarily addressed by lower courts. The Sixth Circuit reviewed the evidentiary record of this case, applied it to §825.110(c), and correctly found that Staunch was not an eligible employee under the FMLA.

Despite the fact that §825.110(c) has been law for over 13 years, only three circuit courts have addressed it in the context of whether an employer has met the burden of proof in a case where the employee produced nothing more than her own unsubstantiated testimony to refute the employer's accurate records. However, the three courts which have examined the issue are all harmonious. *Staunch v. Continental Airlines*, 511 F.3d 625 (6th Cir. 2008); *Knapp v. America*

West Airlines, 207 Fed. Appx. 896, 12 Wage & Hour Cas. 2d 6 (10th Cir. 2006); *Kosakow v. New Rochelle Radiology Associates*, 274 F.3d 706 (2nd Cir. 2001).

The Sixth Circuit joins the Tenth Circuit in finding that an employee who produced nothing more than her own unsubstantiated testimony to refute her employer's records cannot defeat summary judgment under §825.110(c). In *Knapp*, the Tenth Circuit affirmed summary judgment for the employer on the "eligible employee" issue based on the airline's records of the flight attendant's active-duty, training, layover and reserve duty time. 207 Fed. Appx. at 897, 12 Wage & Hour Cas. 2d at 6. The flight attendant "could have produced additional evidence concerning the restrictions on her activities" in order to prove her alleged additional hours worked, but failed to do so. Therefore, summary judgment for the employer was correctly affirmed pursuant to §825.110(c).

In this case, in keeping with *Knapp*, the Sixth Circuit relied on the Sturchio statement compiling pay registers detailing check-in, de-briefing, training and ground time in light of the relevant provisions of the CBA. In response, Staunch submitted an unsubstantiated affidavit containing generalized approximations based on her own recollection, but "failed to present evidence of specific days and hours that she worked performing these alleged uncompensated tasks." *Continental*, 511 F.3d at 630. The Sixth Circuit correctly found that this generalized list did not set forth the specific facts necessary to show a genuine issue for trial.

District court cases involving flight attendants have resulted in routine summary judgment for the airlines under similar analyses. *Rich v. Delta Airlines, Inc.*, 921 F. Supp. 767, 775 (N.D. Ga. 1996) (employer's affidavit interpreting time records was sufficient to meet the employer's burden of proof under §825.110(c)); *Cantrell v. Delta Airlines, Inc.*, 2 F. Supp. 2d 1460, 1463 (N.D. Ga. 1998) (accord); *Robinson-Scott v. Delta Airlines, Inc.*, 4 F. Supp. 2d 1183 (N.D. Ga. 1998) (accord). There are no negative references to any of those three cases.

In the only case in which summary judgment for the employer was vacated, the employee had produced additional evidence to substantiate the allegations contained in her own affidavit. *See Kosakow*, 274 F.3d at 706. The trial court found that the plaintiff could not defeat summary judgment based on her own unsubstantiated allegations. *Kosakow v. New Rochelle Radiology Associates*, 88 F. Supp. 2d 199 (S.D.N.Y. 2000). On appeal, however, the Second Circuit vacated and remanded because the plaintiff also had submitted affidavits of two co-workers stating that the plaintiff worked the extra hours. These two affidavits, combined with the plaintiff's allegations, were enough to create a question of fact. *Kosakow*, 274 F.3d at 706. In the instant case, Staunch presented no evidence to support her own self-serving, vague and generalized recollection.

The Sixth Circuit's decision in this case is also completely consistent with the decisions of this Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680

(1946), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Both *Mt. Clemens* and *Liberty Lobby* deal with basic principles of law regarding what creates a "genuine question of fact" for trial. The Circuit Court's finding that Staunch was not an "eligible employee" under the FMLA does not run afoul of *Mt. Clemens* or *Liberty Lobby* and was the direct result of Staunch's sole reliance on pure inadmissible conjecture that was insufficient to create a question of fact.

Consistent with *Mt. Clemens*, the Sixth Circuit correctly determined that Staunch was not entitled to the relaxed "benefit of the doubt" standard she now urges this Court to impose because she did not refute Continental's accurate records of her hours worked. In *Mt. Clemens*, this Court said that "[u]nless the employer can provide accurate estimates, it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time." *Id.* at 693. In *Mt. Clemens*, the employer did not present any evidence regarding hours worked by the employees that were not reflected on the time clock. 328 U.S. at 689. Consequently, this Court determined that the employees were entitled to the "benefit of the doubt."

In this case, however, Continental *did produce* accurate records proving the hours worked by Staunch and the Sixth Circuit correctly found that Continental had met its burden of proof under §825.110(c) based on these records. In the face of Continental's accurate records, *Mt. Clemens* does not

allow Staunch to rest on her own generalized and unsubstantiated affidavit.[6]

The Sixth Circuit also correctly applied *Mt. Clemens* to a previous case with strikingly similar facts. *See Myers v. The Copper Cellar Corp.*, 192 F.3d 546, 551-52 (6th Cir. 1999). The plaintiffs in *Myers* merely invoked the defendant's payroll records combined with their own "imprecise" testimony. The defendant had produced "precise records from which the plaintiffs could have conclusively reconstructed

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[6] Staunch's argument that she is *presumed eligible* under the FMLA is also unavailing. (*Petitioner's Brief at p. 23* (discussing 29 C.F.R. §825.500(f)(1))). Such a presumption arises only if the employer of exempt employees did not keep records. Continental kept records. Therefore, this regulation is irrelevant to the case at bar. Similarly, Staunch's argument of eligibility under the notice requirements of 29 C.F.R. §825.110(d) is unavailing. Staunch argues that Continental originally confirmed eligibility on FMLA forms and did not subsequently inform Staunch that she was ineligible. She then argues that those facts support Staunch's contention that she was an eligible employee. (*Petitioner's Brief at p. 29*). However, every circuit court of appeals which has reviewed 29 C.F.R. §825.110(d) to the extent that it creates eligibility requirements – in contrast with the specific 1250-hour requirement of 29 C.F.R. §825.110(a)(2) – has declared the regulation invalid. *See Woodford v. Community Action of Greene County*, 268 F.3d 51 (2d. Cir. 2001); *Brungart v. BellSouth Telecomms Inc.*, 231 F.3d 791, 797 (11th Cir. 2000); *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582-83 (7th Cir. 2000); *Knapp v. America West Airlines*, 207 Fed. Appx. 896 (10th Cir. 2006), *Evanoff v. Minneapolis Public Schools*, 11 Fed. Appx. 670 (unpublished) (8th Cir. 2001). In short, there is no conflict among the courts of appeals in interpreting 29 C.F.R. §825.500(f)(1) or 29 C.F.R. §825.110(d).

the definite days and hours during which each plaintiff worked during a designated [shift]." *Id.* at 551. Just as in this case, the Sixth Circuit found that the plaintiffs were not entitled to an inference in their favor because they produced no specific evidence to refute the defendant's records.

Additionally, *Mt. Clemens* is not an FMLA case. It is an FLSA case and does not address the burden of proof in an FMLA case under §825.110(c). Moreover, like *Mt. Clemens*, the FLSA cases cited by Staunch all involve employers subject to the statutory duty to keep time records. Airlines are not subject to the overtime obligations of the FLSA and are thus exempt from the obligation to keep hourly time records. *See Rich,* 921 F. Supp. at 773.

However, *Mt. Clemens* does mirror the standards of §825.110(c) in its holding that where the employer has not kept proper and accurate records and the employee has produced "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference," the employer can still prevail by "com[ing] forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-88. In this case, Continental did both – it produced the Sturchio statement and exhibits thereto with specific evidence detailing Staunch's days, times and places worked, and it simultaneously discredited the generalized and

unsubstantiated estimations in Staunch's affidavit because she did not refute Continental's calculations.[7]

The Sixth Circuit also was entirely faithful to *Liberty Lobby* and its mandate that plaintiffs "set forth the specific facts showing that there is a genuine issue for trial" rather than merely "rest[ing] upon mere allegation or denials." 477 U.S. at 256. In *Liberty Lobby*, this Court recognized that a plaintiff cannot withstand summary judgment "without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendan[t]." *Id.* Rather, "the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Id.* at 257.

The Sixth Circuit's ruling in *Staunch* adheres to these fundamental standards. Continental produced specific evidence of the hours worked by Staunch.[8] In response, Staunch produced her generalized and unsubstantiated affidavit based on her own approximations and recollections. Under *Liberty Lobby*, such

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[7] Indeed, the Sixth Circuit found Staunch's allegations of additional hours worked to be "inflated and unsupported."

[8] Staunch is incorrect in her assertion that Sturchio should not have considered the provisions of the CBA in rendering her determination as to the hours worked by Staunch. To the contrary, this Court has stated that the determination of "hours worked" under the FLSA requires, among other things, consideration of the agreement of the parties. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

an affidavit is not sufficient to defeat summary judgment. Consequently, the Sixth Circuit correctly found Continental's evidence was unrefuted.

Liberty Lobby requires that plaintiffs "present affirmative evidence" or lose on summary judgment, "even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery." Staunch had the opportunity, but made no attempt to explore Continental's records via additional discovery, such as a Rule 30(b)(6) deposition. Therefore, Staunch has absolutely no basis to claim that her affidavit created a genuine triable issue.[9]

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[9] Staunch also complains that the Circuit Court based its decision on the alternative grounds of the eligibility issue and that Continental filed no cross appeal from the decision of the district court which dismissed the case on the merits but did not rule on the eligibility issue. Of course Staunch's protestations are baseless because an appellate court can affirm summary judgment on the basis of any argument raised in the district court. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). A prevailing party is entitled to "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the district court or the Court of Appeals." Thus a cross appeal or cross petition is not necessary. *See Supreme Court Practice*, p. 489 (Eugene Gressman, et al., editors BNA Books, 9th Ed. 2007). Continental raised the eligibility issue both in the district court and in the Court of Appeals. (*Petitioner's Appx. p. 16 and Respondent's Appx. pp. 12-15, excerpts from Continental's Amended Memorandum in Support of its Motion for Summary Judgment*).

CONCLUSION

There is no reason why the Court should grant the petition. Well-settled law on the summary judgment standards and standards in FMLA cases have been followed by the Sixth Circuit. There is no conflict with any decision of this Court or any other circuit court of appeals on the facts of this case. There are no compelling reasons for the Court to review this routine summary judgment decision.

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August 13, 2008

APPENDIX A
Regulations and Rules

"29 C.F.R. §825.110 Which employees are "eligible" to take leave under FMLA?:

(a) An "eligible employee" is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (See §825.105(a) regarding employees who work outside the U.S.)

(c) Whether an employer has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (see 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used. In the event an employer does not maintain an accurate record of hours worked

by an employee, including for employees who are exempt from FLSA's requirement that a record be kept for their hours worked (e.g., bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee is deemed to have met this test. See also §825.500(f). For this purpose, full-time teachers (see §825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave.

(d) The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms

eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (i.e., two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice."

29 C.F.R. §825.500 What records must an employer keep to comply with the FMLA?

(f) If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (i.e., not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

Supreme Court Rule 10.
Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question

in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Federal Rule of Appellate Procedure 35.
En Banc Determination

(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response.

Federal Rule of Civil Procedure 30.
Depositions Upon Oral Examination

(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership

or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

APPENDIX B

Mary Sturchio affidavit

[Attachments Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

HOLLY L. STAUNCH Plaintiff vs. CONTINENTAL AIRLINES, INC. Defendant	CASE NO. 06 CV 1011 JUDGE JAMES GWIN

VERIFIED STATEMENT OF MARY STURCHIO

I, Mary Sturchio, hereby verify and state as follows:

1. I have personal knowledge of the statements made in this Verified Statement submitted in support of Defendant's motion for summary judgment. This information is based upon my personal knowledge and certain business records of Continental Airlines, Inc. ("Continental"), which are attached to this Verified Statement.

2. Continental employs me as the Manager of Human Resources for the Inflight Services division, Newark and Cleveland bases. I have been in this position since July 2000 and have worked for Continental since August 1997.

3. Based upon Continental records and as explained in this verification, I calculate that Holly Staunch's flight time, check-in time, ground time, de-brief time, and training time, in the period from

January 1, 2001, through January 22, 2002, total 1205 hours and 52 minutes. **Attachment A** contains a chart summarizing these calculations. Deducting flight and ground time from January 1, 2001, through January 20, 2001, I calculate that Holly Staunch's flight time, check-in time, ground time, de-brief time, and training from January 21, 2001, through January 22, 2002, total 1127 hours and 41 minutes. See **Attachment A**.

4. **Flight Time:** I relied upon flight attendant pay registers for the applicable months to calculate the flight hours Ms. Staunch worked. Copies of Ms. Staunch's flight attendant pay registers for the months of January 2001 through January 2002 are attached as **Attachment B**. The flight hours per day for each trip are recorded in the column entitled "Pay Time" on these pay registers.

5. **Check-In:** I relied on these pay registers and the contractual provisions contained in the collective bargaining agreement in effect in 2001 and 2002 to calculate the hours Ms. Staunch spent performing check-in activities in connection with the flights she worked during that same time period. Copies of the contractual provisions from the April 1, 2000, through October 1, 2004 Agreement between Continental Airlines, Inc. and International Association of Machinists and Aerospace Workers (CBA) are attached to this verification as **Attachment C**. Under these provisions, flight attendants must check-in for flights on aircrafts with more than 160 customer seats one hour and 15 minutes before the

scheduled flight time if the flight departs from the flight attendant's base (here, Cleveland, which is designated "CLE" on the flight attendant pay registers) and one hour before flight time at all layover points. For flights on aircrafts with 160 or fewer customer seats, a flight attendant must report for check in one hour before the fight if the flight departs from the flight attendant's base and 45 minutes before the flight at all layover points. A flight attendant on a deadheading flight must report 45 minutes before the flight leaves from any departure location and on any type of aircraft. *See* CBA Page 5-3, **Attachment C**.

6. In order to determine the appropriate check-in time for each flight, I first determined the type of aircraft Ms. Staunch worked in each pairing by reading the flight attendant pay registers. The pairing numbers are listed by date of the flight on the line reading "PS," which stands for "Pairing Summary." The first number in each pairing indicates the aircraft type. A designation of "2" stands for a 777 aircraft, "3" is a 757 aircraft, "4" is a 767-400 aircraft, and "5" is a 737 aircraft. Ms. Staunch always worked on a 737 aircraft. The 737 has fewer than 160 customer seats.

7. **Debrief Time:** Under the applicable contractual provision, a flight attendant is expected to remain on a flight on which she is a working crew member for 15 minutes after the flight blocks in or, if Customs clearance is required for the flight, 30 minutes after the flight blocks. *See* CBA page 5-5,

Attachment C. I included the applicable hours for this "debrief time" in calculating Ms. Staunch's hours worked for purposes of this verification.

8. **Ground Time:** Although not compensable time under the CBA, I also have included ground time for the flights flown by Ms. Staunch. Ground time is the time between flight legs when attendants are not necessarily on the plane (after debrief and before check-in), but remain on duty. I included in my calculations the ground time between the flights flown by Ms. Staunch between January 1, 2001, and January 22, 2002.

9. **Training Time:** The CBA provides that flight attendants will be paid 4:15 minutes per day of initial new equipment training or recurrent training. *See* CBA page 6-2, **Attachment C**. During the period from January 2001 through December 2001, Ms. Staunch attended training on two days, April 22 and April 23, 2001. *See* April 2001 flight attendant pay register, **Attachment B**. I included 4:15 for each of these days of training as hours worked. **Attachment A**. Ms. Staunch did not attend any training in January 2002. **Attachment B**.

10. Section 14 of the CBA explains what maternity leave is given to flight attendants. *See* CBA pages 14-1 through 14-10, **Attachment C**. Maternity and pregnancy-related conditions are treated like any other disability under the CBA. *See* CBA page 14-5, **Attachment C**. A flight attendant may continue to fly through the end of her 27th week of pregnancy

App. 11

provided she is fit to perform her duties. Starting the 28th week, she will be placed on a maternity leave of absence. *See* CBA page 14-5, **Attachment C**. At the time of the birth of the baby, the flight attendant may, at her option, elect on a one-time basis to extend the maternity leave up to twelve (12) months following her pregnancy. A flight attendant on a maternity leave of absence will be eligible for sick leave benefits until eight weeks following the date of delivery with verification from her doctor that she is unable to fly. *See* CBA page 14-5, **Attachment C**.

11. Pursuant to 28 U.S.C. § 1746, I verify under penalty of perjury that I have read the foregoing Verified Statement and it is true and correct.

Executed this 14 day of December, 2006.

/s/ Mary Sturchio
Mary Sturchio

/s/ Alta J. Jordan
ALTA J. JORDAN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 17, 2008

APPENDIX C

Excerpts from Defendant Continental Airlines, Inc.'s Amended Memorandum in Support of its Motion for Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HOLLY L. STAUNCH,	)	CASE NO. 06 CV 1011
Plaintiff,	)	JUDGE JAMES GWIN
vs.	)	
CONTINENTAL AIRLINES, INC.,	)	
Defendant.	)	

DEFENDANT CONTINENTAL AIRLINES, INC.'S AMENDED MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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* * *

[8] the proffered reason is a pretext for retaliation. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

As a matter of law, Plaintiff cannot establish either of her FMLA claims because she was never eligible for leave benefits under the FMLA. Moreover, even if Plaintiff had been eligible for FMLA benefits, her interference claim fails because Continental did not deny her requested pregnancy-related leaves. Similarly, Plaintiff's retaliation claim fails as a matter of law because the leave time which Plaintiff alleges to have been FMLA-protected did not contribute in any way to Continental's decision to terminate her employment. Rather, Continental discharged Plaintiff for the legitimate non-retaliatory reason that she flew with a non-compliant safety manual while she was on Termination Warning.

1. Plaintiff Was Not An "Eligible Employee" Under the FMLA.

An FMLA claim cannot be maintained by a plaintiff who was not an "eligible employee." *Humenny v. Genex Corp., Inc.*, 390 F.3d 901, 906 (6th Cir. 2004) (stating that "the FMLA's 'eligible employee requirement' applies in all FMLA cases"). To be an "eligible employee," Plaintiff must prove that she worked for at least 1,250 hours with Continental during the 12-month period prior to the commencement of the leave under review. 29 C.F.R. § 825.110(a)(2). Plaintiff claims that she was an "eligible employee" under the FMLA when she sought leave related to her pregnancy beginning on January

21, 2002.[10] (Am. Compl. ¶¶ 15-16; Pltf. Dep. 429, Ex. 25.) However, because the undisputed facts demonstrate that Plaintiff worked less than the requisite 1,250 hours before taking her leave, she cannot establish that she was an "eligible employee" under the FMLA.

Whether an employee has worked the minimum 1,250 hours of service is determined according to the Fair Labor Standards Act ("FLSA") standards for defining compensable time, as set forth in 29 U.S.C. §207 and 29 C.F.R. Part 785. 29 C.F.R. § 825.110(c). To avoid summary judgment on this [9] issue, Plaintiff must demonstrate a question of material fact as to the accuracy of Continental's time records and show that Continental allowed Plaintiff to perform additional unrecorded hours of work for which she was not compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946); *Cantrell v. Delta Airlines*, 2 F. Supp. 2d 1460, 1462-1463 (N.D. Ga. 1998) (stating that plaintiff has to show the employer's records are not accurate and present evidence on the issue of hours worked that is contrary to the employer's evidence).

The employer's proper and accurate records are generally dispositive of the number of hours worked

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[10] Plaintiff claims that all of her absences between January 21 and April 30, 2002, were protected by the FMLA. (Pltf. Dep. 429.) Plaintiff is not contending that her sick call on January 1 and 2, 2002 was related to her pregnancy. (Pltf. Dep. 149.)

by the employee. *Anderson*, 328 U.S. at 687. In this case, the evidence demonstrates that Continental did keep proper and accurate monthly time records. (Affidavit of Mary Sturchio (hereafter, "Sturchio Aff.") ¶ 4.)[11] Therefore, Continental's records are dispositive of whether Plaintiff worked 1,250 hours prior to taking the leave she alleges to have been FMLA-protected.

Continental's records establish that between January 20, 2001, and January 21, 2002, Plaintiff worked less than 1130 hours. (Sturchio Aff. ¶ 3.) The hours worked were established by compiling the flight attendant pay registers detailing each flight Plaintiff worked, and adding time required by the collective bargaining agreement for check-in and debriefing, as well as training time and ground time. (Sturchio Aff. ¶¶ 3-9.) The records show, and Plaintiff admits, that she was compensated for all work for which she was entitled to receive compensation. (Attachment B to Sturchio Aff., Pltf. Dep. 94.) Consequently, because Plaintiff did not work 1,250 hours in the twelve months preceding the leave in question, she was not an "eligible employee," and thus, was not entitled to benefits under the FMLA. Summary judgment is proper for Defendant on both of Plaintiff's FMLA claims on this ground alone.

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[11] The Affidavit of Mary Sturchio, manager of Human Resources for Continental's Inflight Services, is attached hereto as Exhibit C.

2. <u>There Are No Facts to Support Plaintiff's Interference Claim.</u>

Even if Plaintiff were an eligible employee under the FMLA, to establish an interference claim, Plaintiff would be required to show that Continental denied her requests for pregnancy-related leave.

* * *

APPENDIX D

Excerpts from Final Brief of the Appellant in the Sixth Circuit Court of Appeals

IN THE SIXTH CIRCUIT COURT OF APPEALS

HOLLY L. STAUNCH,	)	CASE NO. 07-3315
Plaintiff-Appellant	)	
	)	
-vs-	)	
CONTINENTAL AIRLINES	)	
	)	
Defendant-Appellee	)	

****

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

FINAL BRIEF OF THE APPELLANT

****

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Continental Airlines, Inc.

* * *

[20] ARGUMENT

APPLICABLE STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. See *City Mgmt. Corp. v. United States Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994). The appellate court must determine, viewing the evidence most favorably to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the law. If the nonmoving party cannot make a sufficient showing on an essential element of its case, the moving party will be entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF CONTINENTAL ON STAUNCH'S CLAIM OF UNLAWFUL INTERFERENCE WITH HER RIGHTS UNDER THE FAMILY MEDICAL LEAVE ACT.

To prevail on an interference claim under the FMLA, "a plaintiff must establish that (1) she is an 'eligible employee,' 29 U.S.C. § 2611(2); (2) the defendant is an 'employer,' 29 U.S.C. § 2611(4); (3) the employee was entitled to leave under the FMLA, 29 U.S.C. § 2612(a)(1); (4) the employee gave the employer notice of his intention to take leave, 29 U.S.C. § 2612(e)(1); and (5) the [21] employer denied the employee FMLA benefits to which he was entitled."

Cavin v. Honda of Am. Mfg., Inc., 346 F.3d 713, 719 (6th Cir. 2003).

Under the FMLA, leave made necessary because of a serious health condition that makes the employee unable to perform the functions of the position of such employee may be taken intermittently or on a reduced leave schedule when medically necessary. 29 USCS § 2612(b)(1). In this case, Continental interfered with Staunch's exercise of her FMLA rights by using her previously approved intermittent FMLA time off from work against Staunch in later disciplinary proceedings against her.

An employer violates the FMLA when it violates either the FMLA statute itself (§ 2615 et seq. or § 2614 et seq.) or its implementing regulations. As stated in 29 C.F.R. § 825.220(b), "any violations of the Act **or of these regulations** constitute interfering with, restraining, or denying the exercise of rights provided by the Act." 29 C.F.R. § 825.220(b) (emphasis added). See also *Schmauch v. Honda of America Manufacturing, Inc.*, 295 F. Supp.2d 823, 828 (S.D. Ohio 2003).

29 C.F.R. § 825.220, entitled: "How are employees protected who request leave or otherwise assert FMLA rights?" states, in pertinent part:

> "Interfering with" the exercise of an employee's rights would include, for example, *not only refusing to authorize FMLA leave,* [22] *but discouraging an employee from using such leave.*

29 CFR § 825.220(b) (emphasis added).

And, section (c) provides that:

> An employer is *prohibited from discriminating against employees* or prospective employees *who have used FMLA leave*. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, *employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.*

29 CFR § 825.220(c) (emphasis added).

In light of the fact that any violation of the FMLA or its implementing regulations constitutes interference with an employee's FMLA rights, the court in the case of *Bradley v. Mary Rutan Hospital Assoc,* 322 F. Supp. 2d 926; 2004 U.S. Dist. LEXIS 12224; 9 Wage & Hour Cas. 2d (BNA) 1424 (2004), decided that it was not necessary to analyze FMLA claims as being either "interference" or "retaliation" claims, and that the burden shifting analysis common to other employment discrimination claims need not apply to FMLA claims. Rather, the court stated:

> This Court prefers, instead, to adopt a single framework for all claims brought by a plaintiff who alleges that her employer used the fact that she took FMLA leave against

her in some unlawful way (by discharging her, not promoting her, denying her benefits to which she [23] otherwise would have been entitled. In such cases, plaintiff would have the burden of establishing that:

1. She is an "eligible employee," 29 U.S.C. § 2611(2);

2. Defendant is an "employer," 29 U.S.C. § 2611(4);

3. She was entitled to take leave for one of the reasons set forth in 29 U.S.C. § 2612(a)(1);

4. She gave proper notice of her intention to take leave, 29 C.F.R. § 825.302; and

5. The employer somehow used the leave against her and in an unlawful manner, as provided in either the statute *or* regulations.

Plaintiff has to prove each of those elements by a preponderance of the evidence in order to prevail.

Appellant respectfully suggests that this analytical framework is superior to trying to adapt the McDonnell Douglas framework to FMLA cases. It is consistent with the law as written and the implementing regulations. Applying this framework to Staunch's claims, it is apparent that Continental was not entitled to summary judgment in its favor. Staunch was an eligible employee. (R.D. 30, Staunch Affidavit at paragraph 10, Jt. Appx. vol. I p. 178).

Continental is an "employer" as defined in 29 U.S.C. 2611(4) as it had more than fifty employees within 75 miles of Cleveland, Ohio, and was engaged in commerce. (See R.D. 46, Continental Airlines Answers to Interrogatories No. 16, Jt. Appx. vol. IV pp. 677-678), (R.D. 42, DeVito Depo. pp. 9-10, Jt. Appx. vol. III pp. 586-587). Staunch was entitled to take leave for one of the reasons set forth in 29 U.S.C. 2612(a), to wit: her own serious health condition resulting from complications of her [24] pregnancy that required her to be under the continuing care of her physician and intermittently prevented her from performing her work as a flight attendant. (See R.D. 41, Exhibit C to Staunch Affidavit of December 18, 2006, Jt. Appx. vol. III pp. 568-570). Staunch gave Continental proper notice of her intention to take leave and she was told her leave request was approved. (R.D. 41, Exhibits C and E to Staunch Affidavit of December 18, 2006, Jt. Appx. vol. III pp. 568-570, 576). Continental used the leave taken by Staunch against her in an unlawful manner, by using the time Staunch took off from work due to her serious health condition against her in later disciplinary proceedings, which is expressly prohibited by the regulations. 29 CFR § 825.220(c). (See R.D. 41, Exhibits F and G to Staunch Affidavit of December 18, 2006, Jt. Appx. vol. III pp. 577-580, R.D. 49, Exhibit H to Staunch Affidavit of December 18, 2006, Jt. Appx. vol IV pp. 841-842, R.D. 46, Staunch Answers to Interrogatories No. 2, Jt. Appx. vol. IV p. 690). Staunch was specifically told by her supervisors that she was placed on termination warning due to her pregnancy related FMLA sick

calls, and that her termination in April 2004 was based upon her work history that included her pregnancy related FMLA qualifying sick calls. Thus, Staunch can establish all of the elements necessary to prove a violation of and interference with her FMLA rights, and therefore, Continental was not entitled to summary judgment in its favor on Staunch's FMLA interference claims.

[25] II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF CONTINENTAL ON STAUNCH'S CLAIM OF UNLAWFUL RETALIATION AGAINST HER FOR EXERCISING HER RIGHTS UNDER THE FMLA.

Past Sixth Circuit precedent has held that subsections (a)(1) and (a)(2) of 29 U.S.C. § 2615 establish two distinct theories of recovery: those of entitlement (interference) and of retaliation. *Edgar v. JAC Prods., Inc.*, 443 F.3d 501, 507 (6th Cir. 2006). Under the entitlement theory, "[t]he issue is simply whether the employer provided its employee the entitlements set forth in the FMLA – for example, a twelve-week leave or reinstatement after taking a medical leave." Id. (citing *Arban v. W. Publ. Corp.*, 345 F.3d 390, 401 (6th Cir. 2003)). The employer's intent is not a relevant part of the entitlement inquiry under § 2615, and the Court need not apply the *McDonnell Douglas* burden-shifting test in such cases. Id. at 507, 508; see also *Schmauch v. Honda of Am. Mfg., Inc.*, 295 F. Supp. 2d 823, 828-31 (S.D. Ohio 2003).

Under the retaliation theory of recovery, on the other hand, an employer's motive is an integral part of the analysis. *Edgar,* 443 F.3d at 508 (citing *Hodgens v. Gen. Dynamics Corp.,* 144 F.3d 151, 160 (1st Cir. 1998)). "The employer's motive is relevant because retaliation claims impose liability on employers that act against employees specifically *because* those employees invoked their FMLA rights." Id.

[26] Where there is direct evidence of retaliatory motive, there is no need for a *McDonnell Douglas* prima facie case analysis. See *Gibson v. City of Louisville,* 336 F.3d 511, 513 (6th Cir. 2003); *Skrjanc v. Great Lakes Power Service Co.,* 272 F.3d 309, 314 (6th Cir. 2001). In a case factually similar to the present case, the court in *Jones v. Select Industries Corp,* 2006 U.S. Dist. LEXIS 40019 (S.D. Ohio 2006), stated:

> Jones claims to have direct evidence of discrimination that Dankworth and Select interfered with her FMLA rights, obviating the need for a *McDonnell-Douglas prima facie* case analysis. While the copies of the termination documentation submitted to the Court are illegible, Barr read the document as stating, above Mike Dankworth's signature.
>
> > Termination for cause under the new attendance policy. Alice has exceeded the maximum allowable levels as well as the total – totality of excused and unexcused absences from the period 9/30/96 to 5/12/02.

> Barr Depo. at 66. This written explanation and Dankworth's later explanation at his deposition are susceptible to the interpretation that excused absences, that is, FMLA-protected absences, played a role in the decision to terminate Jones.

Thus, in the *Jones* case, the court denied summary judgment to the employer. In the present case, as in *Jones,* Continental's documents are susceptible to the interpretation that Staunch's FMLA-protected absences were used to place her on a termination warning and to terminate her employment. Therefore, Continental was not entitled to summary judgment.

[27] Even if the burden shifting approach was proper in this case, Continental was still not entitled to summary judgment. Under the *McDonnell Douglas* framework, Plaintiff must first establish a *prima facie* case of retaliation by showing that: (1) she availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment decision; and (3) there is a causal connection between her exercise of a right under the FMLA and the adverse employment decision. *Skrjanc,* 272 F.3d at 314. Once Plaintiff establishes a *prima facie* case, the burden shifts to Defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Id. at 315. If Defendant meets this burden, Plaintiff must "produce sufficient evidence from which the jury may reasonably reject the employer's explanation." *Manzer v. Diamond Shamrock*

Chems. Co., 29 F.3d 1078, 1083 (6th Cir. 1994). In other words, Plaintiff must show that the reason offered by Defendant was pretextual. *Paxton v. The Wasserstrom Company,* 2006 U.S. Dist. LEXIS 15457 (S.D. Ohio 2006).

The burden of demonstrating a causal connection between an employee's FMLA-qualifying leave and termination, at the *prima facie* stage, is minimal. See *Paxton,* supra, *Dage v. Time Warner Cable,* 395 F. Supp.2d 668, 676 (S.D. Ohio 2005).

[28] Applying this law to the present case, there is evidence that Staunch availed herself of a right under the FMLA (she took leave due to her pregnancy); she suffered adverse employment actions (she was placed on termination warning and ultimately discharged); and there was a causal relationship between her leave and the employment actions (Continental's documents repeatedly reference Staunch's absences from work during the period of her approved intermittent FMLA as the basis for disciplinary action against her). Thus, Staunch established a prima facie case of retaliation under the FMLA.

Continental asserts two reasons it contends are legitimate non-discriminatory reasons for Staunch's discharge. Those are Staunch's non-FMLA qualifying absences, and her failure to have her flight manual up to date.

Staunch may demonstrate pretext by showing the employer's reason(s) (1) have no basis in fact; (2) did not actually motivate the employer's challenged

conduct; or (3) were insufficient to warrant the challenged action. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F. 3d 1078 (6th Cir. 1994).

While Staunch admits that the reasons advanced by Continental did have a basis in fact because she did have non-FMLA absences and she voluntarily disclosed that her flight manual was not up to date, there is substantial evidence in the record that those reasons did not actually motivate the decision to place [29] Staunch on termination warning and/or were insufficient to warrant her discharge from employment.

Staunch's non-FMLA absences did not motivate the decision to place her on a termination warning because Continental had an attendance policy that provided that any absence or incident is defined as any specific period of absence from work for a single reason. (R.D. 42, DeVito Depo. p. 46, Jt. Appx. vol. III p. 596). Thus, Staunch's absence from work in May, 2003, which was all for a single reason, (R.D. 46, Staunch Affidavit at paragraph 13, Jt. Appx. vol. IV p. 664), would not have led to her being placed on a termination warning without the inclusion of her FMLA protected absences, that were also noted on the notice to Staunch placing her on termination warning. Therefore, Staunch can demonstrate that Continental's explanation that Staunch was placed on termination warning and discharged for her non-FMLA protected absences was pretextual.

Continental also contends that Staunch was terminated for not having her flight manual up to date in violation of company policy and Federal Air Regulations of the Federal Aviation Administration. (R.D. 42, De Vito Depo. p. 66, it Appx. vol. III p. 601). However, the undisputed evidence was that Staunch was the only flight attendant discharged for this violation. De Vito testified that other than the non-compliant manual, there were no performance issues other than those that related to reliability that formed the basis for Staunch's discharge. (R.D. [30] 42, De Vito Depo. P. 67, Jt. Appx. vol. III p. 601). Margo Jedlinski and Nicole Longshaw were other flight attendants found to have non-compliant flight manuals and received no discipline. (R.D. 42, De Vito Depo. pp. 99-100, Jt. Appx. vol. III p. 609). Cheryl Miller, Dawn Thibeaux, and Jennifer Orlando were flight attendants found to have non-compliant manuals and were given written warnings. (R.D. 42, De Vito Depo. p. 101-103, Jt. Appx. vol. III pp. 609-610). It is clear that had Staunch not been unfairly placed on termination warning based upon her pregnancy related absences from work, she would not have been terminated for reporting to management that she had found that her flight manual was missing a revision. Thus, the fact that she was found to be in possession of a non-compliant flight manual was insufficient to warrant her discharge, and was therefore pretextual.

Finally, even in the context of pretext, the repeated statements in Continental's records that Staunch's absences between January and April of

2002, due to her FMLA protected leave, were used against her in the disciplinary process are evidence of pretext. Where it is clear from the evidence that the Plaintiff was discharged, at least in part, because of her FMLA protected absences, summary judgment in favor of the employer is not appropriate. *Paxton,* supra.

* * *

APPENDIX E

Excerpts from Final Reply Brief of the Appellant in the Sixth Circuit Court of Appeals

IN THE SIXTH CIRCUIT COURT OF APPEALS

HOLLY L. STAUNCH	)	CASE NO. 07-3315
Staunch-Appellant	)	
	)	
-vs-	)	
CONTINENTAL AIRLINES	)	
	)	
Continental-Appellee	)	

****

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO

FINAL REPLY BRIEF OF THE APPELLANT

****

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* * *

6] I. THE RECORD CONTAINS SUFFICIENT EVIDENCE THAT STAUNCH WAS AN ELIGIBLE EMPLOYEE UNDER THE FMLA TO WITHSTAND SUMMARY JUDGMENT IN FAVOR OF CONTINENTAL.

As the court is well aware, upon deciding summary judgment, all of the evidence and all reasonable inferences from the evidence must be construed most strongly in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574; 106 S. Ct. 1348; 89 L. Ed. 2d 538 (1986). Applying this standard, it is clear that Continental was not entitled to summary judgment on the ground that Staunch did not work 1250 hours in the twelve months preceding her request for intermittent family medical leave due to her pregnancy.

To determine if an employee has the requisite 1,250 hours of service with his employer, the FMLA directs courts to examine the principles for calculating hours of service that have been established under the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 2611(2)(C), 29 C.F.R. § 825.110(c). The test for determining if an employee's time constitutes working time is whether the "time is spent predominantly for the employer's benefit or for the employee's." *Skidmore v. Swift & Co.*, 323 U.S. 134, 137, 65 S. Ct. 161, 89 L. Ed. 124 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S. Ct. 165, 89 L. Ed. 118 (1944). That test requires consideration of the agreement of the parties, the nature and extent of the restrictions, the relationship between services rendered and

on-call time, and all surrounding circumstances. *Skidmore,* 323 U.S. at 137. In other words, hours [7] spent by an employee engaged in his principal work activities are considered to be hours worked under the FLSA. *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 690, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).

In the present case, there was no dispute that Holly L. Staunch had been employed by Continental Continental [sic] Airlines, Inc., for more than twelve months. Nor was there any dispute that she was employed at a work site where there were more than fifty employees within a seventy five mile radius. (See R.D. 46, Continental's Answers to Interrogatories Nos. 16 (Continental employs 2,110 at Cleveland Hopkins Airport) Jt. Appx. vol. IV pp. 167-168, and 19 (Staunch's date of hire was April 22, 1998) Jt. Appx. vol. IV pp. 678-679). There was however, a dispute about whether Staunch worked 1250 hours.

First, it must be noted that the record affirmatively demonstrated that Continental did not keep an accurate record of Staunch's actual hours worked. Pay for flight attendants was based upon certain contractual agreements that were based upon predetermined flight hours, and was not based upon the actual time worked. (R.D. 42, DeVito Depo. p. 84, Jr. Appx. vol. III p. 605 ("Flight Attendants are compensated from "block in", when the main cabin door is closed to "block out", when the aircraft arrives and the door is reopened.) Thus, the records contained in Attachment A to Mary Sturchio's affidavit were not records of [8] the actual time worked by Staunch.

Staunch's affidavit specifically contested the accuracy of Continental's records. She stated:

> 8. Continental's submission based upon the affidavit of Mary Sturchio does not reflect the actual hours I worked for Continental. For example, the Sturchio submission listed release time as 15 minutes for each duty day worked. In fact, work was performed after each flight segment and 15 minutes was not sufficient to perform the duties required.
>
> 9. Sturchio's submission listed forty five minutes for report time for a remain overnight layover, when in fact, I had to report at least one hour before the start of each day.
>
> 10. Sturchio's affidavit does not accurately reflect the time spent in recurrent training and in preparation for recurrent training.
>
> 11. Sturchio's affidavit does not include time for required computer work, manual revisions, review of briefing books, meetings with supervisors, time for making required liquor deposits as lead flight attendant, time going through customs or travel time spent on behalf of the employer. (R.D. 46, Staunch Affidavit, Paragraphs 8-11, Jt. Appx. pp. 663-664).

If "an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked . . . the

employer has the burden of showing that the employee has not worked the requisite hours." 29 C.F.R. § 825.110(c). In such cases, the employer must be able to clearly demonstrate that the subject employee did not work the 1,250 hours during the previous twelve months in order to claim that the employee is not eligible under the FMLA. 29 C.F.R. § [9]825.110(c). *Rivero V. United Airlines, Inc,* 2005 U.S. Dist. LEXIS 297 (2005).

In this case, the employer did not meet the required burden. Staunch had personal knowledge of the hours she worked. She filed an affidavit stating she worked more than 1250 hours in the twelve months prior to her request for FMLA leave. (R.D. 30, Affidavit of Holly Staunch 9/25/06, Jt. Appx. vol. I pp. 177-181). She prepared and submitted to Continental, with her answers to interrogatories and response to Continental's Request for production of documents her calculation of hours showing she worked 2,175 hours engaged in her principal work activities for Continental Airlines in the twelve months prior to her request for FMLA. (See R.D. 46, Exhibit "J" to Staunch Affidavit of January 8, 2007, Jt. Appx. vol. IV pp. 666-668). After reviewing Continental's motion for summary judgment, Staunch learned that she had understated her flight hours and as a result she actually worked 2,323 hours and 52 minutes for Continental in the twelve months preceding her request for leave. (R.D. 46, Staunch Affidavit of January 8, 2007 Paragraph 7, Jt. Appx. vol. IV p. 663).

In her deposition, Janie DeVito, Inflight Director for Continental [sic] Continental Airlines, acknowledged that there are activities for the benefit of the employer that flight attendants are expected to perform, but are not included in the calculation of hours worked or monetary compensation paid to flight attendants. [10] Monetary compensation is determined based upon the value of the schedule awarded to the flight attendant. (R.D. 42, DeVito Depo. p. 83, Jt. Appx. vol. III p. 605). That compensation is based upon "block hours." Block hours are measured from the time the main cabin door is closed upon departure to the time it is opened upon arrival at the destination. (R.D. 42, DeVito Depo. p. 84, Jt. Appx. vol. III p. 605). For the block time, flight attendants are paid an hourly rate. (R.D. 42, DeVito Depo. p. 84, Jt. Appx. vol. III p. 605). DeVito expressly acknowledged that there are additional duties that are performed outside the period between block in and block out. (R.D. 42, DeVito Depo. p. 85, Jt. Appx. vol. III p. 605). DeVito specifically acknowledged that there are duties such as reading items placed in employee's files ((R.D. 42, DeVito Depo. p. 87, Jt. Appx. vol. III p. 606), reviewing briefing books, (R.D. 42, DeVito Depo. p. 90, Jt. Appx. vol. III p. 607), reading monthly operational newsletters, (R.D. 42, DeVito Depo. p. 91, Jt. Appx. vol. III p. 607), meeting with supervisors, (R.D. 42, DeVito Depo. p. 91, Jt. Appx. vol. III p. 607), going through customs on international flights, (R.D. 42, DeVito Depo. p. 91, Jt. Appx. vol. III p. 607), and waiting onboard a plane when it is a through flight, (R.D. 42, DeVito Depo. p.

94, Jt. Appx. vol. III p. 608), that are not covered by the block in block out times that are reflected in Continental's records of employee hours worked.

DeVito contended at her deposition that much of the reading could be done [11] by a flight attendant while in flight. She stated, "They can read it in the line of duty. That is, while I'm on the airplane being paid, I can read the material. That is an acceptable time frame for perusing that information." (R.D. 42, DeVito Depo. p. 88, Jt. Appx. vol. III p. 606).

DeVito's statement is directly contradictory to Continental' [sic] applicable policy that states that flight attendants are not to read while on duty. (See R.D. 46, Staunch Affidavit of January 8, 2007, Paragraph 12, Jt. Appx. vol. IV p. 664).

It is apparent that there is a genuine issue of material fact as to whether Staunch worked the requisite number of hours to be an eligible employee under the FMLA and thus, Continental was not entitled to summary judgment on this ground.

II. WHERE AN EMPLOYER USES FMLA QUALIFYING LEAVE AS A NEGATIVE FACTOR IN DISCIPLINARY ACTIONS AGAINST AN EMPLOYEE, THE EMPLOYER HAS INTERFERED WITH THE EMPLOYEE'S FMLA RIGHTS WITHOUT REGARD TO THE EMPLOYER'S INTENT OR MOTIVE.

Continental's response to Staunch's claim that it interfered with her FMLA rights erroneously contends

that if Staunch was allowed to take all the time off from work that she requested, she cannot state a claim for interference with her FMLA rights. (Brief of Appellee at p. 35). Continental's brief assumes that if an employee is complaining that they were terminated from employment, they must

* * *

APPENDIX F

Docket Sheet from
Sixth Circuit Court of Appeals

General Docket
United States Court of Appeals
for the Sixth Circuit

Court of Appeals Docket #: 07-3315
Nature of Suit: 3442 Civil Rights: Jobs
Staunch v. Continental Airlines
Appeal From: Northern District of Ohio at Cleveland

Docketed: 03/20/2007
Termed: 01/07/2008

Case Type Information:
1) Civil
2) Private
3) Civil Rights

Originating Court Information:
District: 0647-1 : 06-01011
Trial Judge: James S. Gwin, U.S. District Judge
Date Filed: 04/25/2006
Date Order/Judgment: 01/26/2007
Date NOA Filed: 02/08/2007

10/15/2007	Oral argument notice filed by Attorney Mr. Martin S. Hume for Appellant Holly L. Staunch.
10/15/2007	Oral argument notice filed by Attorney Ms. Janette M. Louard for Appellee Continental Airlines, Inc..
11/16/2007	ADDITIONAL CITATION filed by Mr. Martin S. Hume for Holly L. Staunch. Certificate of Service:11/14/2007.
11/29/2007	CAUSE ARGUED by Mr. Martin S. Hume for Appellant Holly L. Staunch and Ms. Janette M. Louard for

		Appellee Continental Airlines, Inc. before Judges Kennedy; Martin; Clay.
01/07/2008	■	OPINION filed : AFFIRMED; decision for publication pursuant to local rule 206. Cornelia G. Kennedy (AUTHORING), Boyce F. Martin, Jr., Eric L. Clay, Circuit Judges.
01/07/2008		JUDGMENT : AFFIRMED.
01/22/2008		PETITION for en banc rehearing filed by Mr. Martin S. Hume for Holly L. Staunch. Certificate of Service: 01/21/2008
04/11/2008	■	ORDER filed denying petition for en banc rehearing [3716484-2] filed by Mr. Martin S. Hume for Holly L. Staunch. Cornelia G. Kennedy, Boyce F. Martin, Jr., Eric L. Clay, Circuit Judges.
04/24/2008	■	MANDATE ISSUED with no costs taxed.
07/17/2008		U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Holly L. Staunch. Supreme Court Filed Date: 07/09/2008, Supreme Court Case Number: 08-53.

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(2)

No. 08-53

Supreme Court, U.S.
FILED
AUG 25 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

HOLLY L. STAUNCH,

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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1 Weinstein's Federal Evidence § 301.02[1] (2d. Ed. 1997) 5

9 Wigmore on Evidence 2487 (Chadbourn rev. 1981) 5

PETITIONER'S REPLY BRIEF

I. THE DECISION OF THE SIXTH CIRCUIT IN THE PRESENT CASE CONFLICTS WITH THE DECISION OF THE SECOND CIRCUIT IN THE CASE OF *KOSAKOW V. NEW ROCHELLE RADIOLOGY ASSOCIATES.*

Continental argues that the decision of the Sixth Circuit in the present case is harmonious with the decisions of other courts of appeals. Continental specifically cites the case of *Kosakow v. New Rochelle Radiology Associates*, 274 F.3d 706 (2d Cir. 2001), as one of those "harmonious" cases. (Continental Brief at p. 15).

The contention that the *Kosakow* case is harmonious with the decision of the Sixth Circuit in this case is disingenuous. In *Kosakow*, the court held that genuine issues of material fact existed as to whether the employee arrived at work fifteen (15) minutes before the start of her shift each day, and what functions she performed during that time, precluding summary judgment as to whether such time could be counted in determining whether she worked the requisite hours to be covered under the FMLA.

The court in *Kosakow* stated as follows:

> Kosakow is not, however, necessarily claiming that the timesheets were inaccurate. To be precise, she does not dispute that her shift began at 8:00 a.m., nor does she argue that the timesheets are inaccurate insofar as they reflect

> the fact that her pay was based upon her shift beginning at 8:00 a.m. [FN1] To the contrary, her claim is that in order to fulfill her job responsibilities, it was necessary that she arrive at 7:45 a.m. despite the fact that her shift did not begin until 8:00 a.m. She argues that these fifteen minutes each morning should count towards her hours worked, despite the fact that they were not included in her paychecks or on her timesheets.
>
> **FN1. Because she is not actually challenging the documentary evidence, her affidavit alone should have been sufficient to create a genuine issue of fact.**
>
> We conclude that questions of fact exist concerning whether Kosakow arrived at 7:45 a.m. each day and what functions she performed in the fifteen minutes before her shift.

(emphasis added).

Like the plaintiff in the *Kosakow* case, who did not necessarily claim that her timesheets were inaccurate, Staunch did not claim that Continental's records were inaccurate. Rather, Staunch, like the plaintiff in *Kosakow*, claimed that Continental's records did not reflect all of the time she spent in service to her employer and offered her own affidavit to include the omitted time. Contrary to the argument of Continental that the decision in the *Kosakow* case was based upon the corroborating evidence submitted by two other employees, the court specifically stated in footnote 1, "Because she is not actually challenging the

documentary evidence, **her affidavit alone** should have been sufficient to create a genuine issues of material fact." (emphasis added).

Fair reading of the decisions of the Second Circuit in the *Kosakow* case and the Sixth Circuit in the present case can only lead to the conclusion that the two courts have reached conflicting opinions on the same important matter.

It is noteworthy that the other case cited by Continental, *Knapp v. America West Airlines*, 207 Fed. Appx. 896 (10th Cir. 2006), has been subject to severe criticism. See "Tenth Circuit Misperceives and Misapplies the Purpose of the FMLA," 73 J. Air L. & Com. 113, 119+ (2008). Even the *Knapp* decision, however, acknowledged that many of the hours of the type claimed by Staunch, such as active duty time, training time and layover time should be counted toward hours worked for determining eligibility under the FMLA. It was only reserve time, where the employee was not in active service to the employer, that the court found to be properly excluded.

The conflicting opinions of the Second and Sixth circuits, the criticism of the *Knapp* decision, and the deviation by the Sixth Circuit from established precedent under the cases decided under the Fair Labor Standards Act (which standards were expressly adopted by Congress when it enacted the FMLA), all lead to the conclusion that the present case is worthy of review by the Supreme Court.

II. STAUNCH IS NOT ASKING THE SUPREME COURT TO ENGAGE IN DETAILED EVIDENTIARY ANALYSIS.

Continental argues that the court should not grant Staunch's petition for certiorari because it is not the role of the Court to engage in fact finding and evidentiary analysis. In order to answer the questions presented in this case, it will not be necessary for the court to do so.

The Sixth Circuit held that in order to avoid summary judgment, Staunch was required to "produce evidence of the specific days and hours she worked" in order to meet the definition of "eligible employee" under the Family Medical Leave Act. The Court may hold that this is an improper standard, that places a greater burden on employees than Congress intended when it enacted the FMLA, without getting into the details of each party's submission. In order to decide this case, it is sufficient to note that there is conflicting evidence on the question of the number of hours worked by Staunch for Continental in the twelve months preceding her request for leave.

III. STAUNCH HAS NOT WAIVED ANY OF THE ARGUMENTS MADE IN HER PETITION FOR CERTIORARI.

Continental misperceives the reason why Staunch included in her petition for certiorari regulations demonstrating she was presumed to be an eligible employee under the FMLA pursuant to 29 C.F.R. §§ 825.110(d) and 825.500(f)(1). Although Staunch met the predicate for establishing that she was

presumed eligible under those sections, once Continental submitted the affidavit of Mary Sturchio contending that Staunch did not work 1250 hours in the twelve months preceding her request for leave, that issue became contested. As stated in the case of *Routen v. West*, 142 F.3d 1434 (C.A. Fed. 1998):

> The presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue. When the predicate evidence is established that triggers the presumption, the further evidentiary gap is filled by the presumption. *See 1 Weinstein's Federal Evidence* § 301.02[1], at 301-7 (2d ed. 1997); 2 *McCormick on Evidence* § 342, at 450 (John W. Strong ed., 4th ed. 1992). However, when the opposing party puts in proof to the contrary of that provided by the presumption, and that proof meets the requisite level, the presumption disappears. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S.Ct. 1089, 1094-95, 67 L.Ed.2d 207 (1981); *A.C. Aukerman*, 960 F.2d at 1037 ("[A] presumption ... completely vanishes upon the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact."); *see also Weinstein's Federal Evidence* § 301App.100, at 301App.-13 (explaining that in the "bursting bubble" theory once the presumption is overcome, then it disappears from the case); 9 *Wigmore on Evidence* § 2487, at 295-96 (Chadbourn rev. 1981). *See generally* Charles V. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 Mich. L.Rev. 195 (1953).

> The party originally favored by the presumption is now put to his factually-supported proof. This is because the presumption does not shift the burden of persuasion, and the party on whom that burden falls must ultimately prove the point at issue by the requisite standard of proof. *See* Fed.R.Evid. 301; *A.C. Aukerman,* 960 F.2d at 1038-39. *But see McCormick on Evidence* § 344, at 470-72 (describing an alternative to the bursting bubble rule in which application of a presumption shifts the burden of persuasion); Edmund M. Morgan, *Presumptions,* 12 Wash. L.Rev. 225 (1937).

In this case, Staunch contends that 29 C.F.R. § 825.110(d) does have the effect of changing the applicable burden of proof by placing the burden on the employer to prove that the employee did not work 1250 hours in the twelve months preceding her request for leave. The regulation states in relevant part, "An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not 'eligible' for FMLA leave." However, where evidence is submitted in support of each party's position, the burden of proof is essentially irrelevant to summary judgment analysis. The question is simply whether there is a genuine issue of material fact.

The purpose of including arguments regarding the presumption of eligibility as stated in the cited regulations is to make it clear that the Sixth Circuit misinterpreted the FMLA when it held that, in order to meet the definition of eligible employee, the

employee must produce evidence of the specific days and hours she worked in order to meet the definition of "eligible employee" under the Family Medical Leave Act. No such requirement is contained in the FMLA itself, or in the applicable regulations. The cited regulations are relevant and proper for the Court to consider when deciding the questions presented in this petition. Staunch has consistently maintained that she was an eligible employee under the FMLA and has not waived any arguments in support of that position.

CONCLUSION

For the reasons stated herein and in the Petition for Certiorari, Staunch respectfully requests the court to grant her request to review the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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